In the Supreme Court of the United States

OCTOBER TERM, 1973

NO.

HARRY WALLACE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

The Petitioner, Harry Wallace, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION OF THE COURT BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit in *United States of America* v. *Thomas Joyce, Burton Sherre, and Harry Wallace,* Nos. 73-1014-1016, was entered on May 9, 1974, but is not yet officially reported. It is printed as Appendix A to this Petition. (App. 1) The Petition for Rehearing, denied on June 4, 1974, is printed as Appendix B. (App. 30).

JURISDICTION

The judgment of the Court of Appeals affirming the conviction in the District Court was entered on May 9, 1974. A timely Petition for Rehearing was denied on June 4, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Where a non-admitted offshore surplus lines and excess insurance company grossly overstates its assets, employing that overstatement as a device for acquiring a broker (likewise engaged in high risk questionable-responsibility insurance) to obtain for it insurance business; and where the broker thereafter procures assureds; and where such broker retains as a fund 60% to 100% of collected premiums for the purpose of paying claims and expenses incident to claim adjustments relating to policies issued those assureds; and where a party to the original false overstatement of assets is also an attorney engaged in the actual adjustment of bona fide claims payable from that fund; and where such attorney requests payment of fees from the premium fund:

Then, does his letter of request to the broker-depositor of those funds for fees for adjustment services, consti-

tute a letter tending to further a scheme to defraud where the gravamen of the fraud consisted in misstatement of the insurance company's assets?

STATUTORY PROVISION INVOLVED

Title 18, United States Code, Section 1341

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the decision thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended Aug. 12, 1970, Pub.L. 91-375, §6(j) (11), 84 Stat. 778.

STATEMENT OF THE CASE.

Harry Wallace was indicted with three co-defendants, Thomas Joyce, Burton Sherre, and Robert Ostrander in a fifteen count indictment, charging mail fraud in violation of 18 U.S.C. §1314. Count I recited the underlying scheme to defraud. All counts alleged a mailing in furtherance of the underlying scheme.

Not guilty verdicts, jury verdicts, successful motions for acquittal, and motions to dismiss left the defendant Wallace guilty of but one count, Count V, which was sustained on appeal.

Count V alleged Sherre sent a letter to an Ohio insurance broker, Paterson in furtherance of the scheme.

The scheme alleged in Count I, named as "victims", among others, Thomas H. Paterson and International Excess Agency, Inc., Paterson's brokerage company.

The scheme to defraud as alleged, consisted in the defendants' false portrayal of the assets of Global Surplus and Excess Ltd., a Bahaman insurance company owned by some of the defendants, by which they induced brokers and agents such as International Excess Agency, Inc. to believe that assets were available to protect Global policyholders, and thus induced such victims to engage in soliciting insurance customers.

Defendant Ostrander pled guilty and did not stand trial. Wallace, Joyce and Sherre were variously convicted on July 5, 1972 following trial by jury. Joyce and Wallace were found guilty of Count V, Sherre, not guilty. Thereafter the trial judge acquitted Joyce on Count V.

On review, the Court of Appeals, one judge dissenting, affirmed Wallace's conviction on Count V, the only count as to which Wallace was convicted. Wallace was the only

defendant ultimately found guilty of the Count V violation. The dissenting judge would have reversed as to Count V on the grounds that the count letter did not fall within the conversion scheme and that there was a failure of proof that Wallace was criminally responsible for the letter.

STATEMENT OF FACTS

For the purposes of this Petition, Petitioner Wallace does not contest the sufficiency of the proof of the underlying scheme.

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Government witness Thomas Patterson testified that he did business as International Excess Agency, Inc., Excess & Surplus Line Insurance Brokers (Tr. 818) in Ohio (Tr. 819). In the summer of 1965 he and his corporation arranged to do business with Global, of which Wallace was president (Tr. 821-830).

On November 30, 1965 his corporation was instructed by letter from defendant Sherre to deposit net premiums he collected in a Cleveland, Ohio account on behalf of Global (Government Exhibit 23, Tr. 831-832).

On December 8, 1965, defendant Wallace instructed Paterson by letter (Government Exhibit 24, Tr. 831-835) to disregard previous instructions concerning premium remittances. He directed Paterson to open an account at a bank of Paterson's choice in Ohio for deposit of 60% of premium funds emanating from Paterson's office, for the purpose of providing funds for "the payment of losses and related loss adjustment expenses arising from claims under policies of insurance effected by your office." That letter further instructed Paterson to remit the remaining 40% of net premium to Global's Miami, Florida office (Government Ex. 24, Tr. 831-835).

Paterson followed neither procedure. For several months he deposited the 60% in the account he opened in Cleveland and sent the remaining 40% to Miami. Thereafter, he stopped sending the 40% to Miami but continued to deposit the 60% in Cleveland (Tr. 837). That state of affairs came about when the Ohio Insurance Department instructed him in July of 1966 to cease writing new business with Global. Thereafter, Paterson got the count letter, dated December 31, 1966. (Government Ex. 28-A, Tr. 849-850)

Exhibit 28-A, the count letter, reads:

Burton Sherre
Attorney at Law
7019 W. Higgins Ave.
Chicago, Illinois 60656

SPring 4-1363

December 31, 1966

International Excess Agency, Inc.
1414 So. Green Road
Cleveland, Ohio 44121

Att: Mr. Tom Paterson

Dear Mr. Paterson:

Please be advised that Global Surplus and Excess Limited has authorized you to pay the two loss claims of Seminole Theatres, Inc., D/B/A Arrow Drive-In Theatre. Our share of the claim pertaining to the lightning damage is $1,479.60, but our responsibility, according to your note of November 22, 1966, is only ½, as Benelux shares the other ½. So our share, therefore, is $739.80. On the other claim, Business Interruption, our share of the loss is $380.42. Is Benelux supposed to share this loss also? I find no

indication in your notes one way or another. Please advise.

Tom Joyce tried to call you yesterday afternoon (Friday, Dec. 30), but unfortunately there was no answer. I am sure he will be in further contact with your office. We were in the law library working on matters pertaining to legal liability as it concerns many of the loss claims you submitted. Due to the fact that I have and am spending many hours on claims coming from your office, Tom Joyce, Harry Wallace and Bob Ostrander agree that some of the cost of my legal services should come from funds your office holds in behalf of Global Surplus and Excess Limited.

Accordingly, therefore, I would appreciate, all the above parties agreeing thereto, having you forward to me the sum of $1,000.00, covering legal services. As you well know I have innumerable claims lately and still have on my desk many more claims, not counting those matters in litigation. Frankly, it is through my efforts that some determination has been made. Further, I would like to advise you that I will soon be contacting Carvalho & Co. to make a similar request upon advice to the above parties.

Very truly yours,

/S/
Burton Sherre

S/a

The author of the count letter, Sherre, was a lawyer. No contentions were made that he did not do the work for which he sought compensation. Rather, Paterson testified, on December 27, 1966 he told Joyce that he had been instructed by the Ohio Insurance Department to keep Global funds in escrow, which he repeated January 5, 1967 in a telephone conversation with Sherre (Tr. 873-874, 877).

In setting aside Joyce's conviction under Count V, the trial judge concluded that Joyce neither knew nor should have foreseen that Sherre would write the letter (See Appendix C).

In denying relief to Wallace as to that count, the trial judge concluded he had erred in acquitting Joyce on Count V (See Appendix D).

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Following denial of the petition for rehearing, the trial judge reduced the sentence of one year he had previously imposed, to a sentence of 10 months.

REASONS FOR GRANTING THE WRIT

For the purposes of this petition, we will concede the victim's reliance on the defendants' false representations as to Global's financial condition.[1]

Petitioner Wallace was vicariously charged with transmitting a letter in furtherance of a scheme to defraud. The least that should be required, since intent is material to proof of the crime, is a plausible assertion that at the time of mailing the "schemers" themselves would have appreciated the felonious intent with which the letter was mailed.

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[1] Our concession is far from niggardly. The government's theory proposes that persons were misled by the falsification of Global's assets. This would actually be true only of those who do not read English, or do not understand it.

In the insurance industry high risk companies take the business that financially sound companies reject. The garbage, in short. "Surplus" and "excess" are, in this context, euphemisms for "scavenger." "Global Surplus and Excess, Ltd.," freely translates to "Global Offal and Detritus Processors, Ltd." The "victim" is none other than "International Excess Agency," whose very name likewise reveals its character. We know from the name alone, for example, that Paterson (International) is not in regular business contact with Hartford Fire.

Global was "non-admitted" anywhere in the United States. Where insurers are non-admitted, there is a reason for their non-admission. Always a financial reason. No money. The charter of an offshore non-admitted surplus company is offshore because if it were not it would be revoked.

Global, as a "surplus lines, non-admitted, offshore, excess" company was underfinanced by definition. Men simply do not put sub-

(Footnote continued)

The letter upon which Petitioner Wallace was convicted was written by one of the alleged schemers, a lawyer, seeking modest compensation for services he actually performed for the adjustment of bona fide loss claims.

The government did not claim a failure or refusal to pay losses caused by Global's insolvency. Indeed, the government never responded to a challenge that it do so (Tr. 1474-1475). The fraud delineated by the indictment and established by the proof consisted in misrepresenting as financially sound an insurance company which was financially shaky.

But the financial weakness of the company was not proposed, nor could it be, as evidence that the company was

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(Footnote continued)

stantial assets in "high risk" companies, or chuck-a-luck games. Financially responsible companies reject customers who are high wire acrobats, wildcat Gulf oil drillers and drivers with multiple drunk driving convictions. Such risks are called "substandard."

The "victim" (International) was in the excess business a number of years. We are supposed to assume that International swallowed whole the inviting financial representations of Global, a non-admitted, offshore, surplus *"and"* excess lines insurer. International compensated for its credulity by retaining the premiums paid by insureds. It retained the premiums in a bank of *its* choice, i.e., a bank in which International (not Global) dealt with the banker, i.e., International got the interest. The credulous "victim" kept one hand on the money.

An alternative view would suggest that Paterson of International knew exactly what he was dealing with because he could read and understand plain English. But then there would be no victim and no federal prosecution. Since a federal prosecution ensued, it follows that Paterson, whose business was surplus and excess, knew nothing about surplus and excess.

an insurance company in name only and did not in truth and in fact provide insurance protection for its assureds.

To the extent that Global issued policies, set up loss reserves in bank accounts, processed claims by or against assureds, adjusted those claims and paid them, that enterprise, however watered its assets, was not, in the enumerated particulars, engaged in a scheme to defraud.

The actual "fraud" which emerged from the evidence was the fraud of sailing under false financial colors. Global did not engage in the fraud of pretending to be an insurance company engaged in the insurance business when it was really a non-insurance company engaged in the theft business.

Now assuming that Global was as fragile financially as the government claimed, and we daresay that it was, it does not follow that in the conduct of its insurance business every use of the mails in which it engaged furthered the fraud. Indeed, to the extent that the schemers caused Global to process claims and pay losses, they did so in derogation of their scheme to defraud. For the payment of assureds' claims and payment of adjustment expenses left less money to be stolen by the schemers, if theft was their purpose (altough there was no evidence to that effect).

Whether one's view of criminal law enforcement be hardline or softline, neither view would propose that the dignity of a conviction is enhanced where justification of the conviction depends upon an absurdity. Such is the situation here. In its opinion (Appendix A, pages 8-9) the Court of Appeals sustained the count, stating, "With Wallace's and Joyce's consent, Sherre was attempting to obtain for himself funds that were segregated for the

benefit of policyholders' claims in Ohio. The letter thus falls within the conversion scheme alleged."

The dissenting judge had a different view (Appendix A, pages 25-26). Noting that the scheme alleged in the indictment referred to misrepresentations to brokers and state insurance agencies concerning the nature of assets held by Global, the dissent urged reversal, saying, "The scheme was not use of the mails to defraud by settling claims and seeking payment from retained premium to pay legal counsel." (App. A, 26).

In the government's view of mail fraud, and apparently in that of the Court of Appeals, if a business obtains customers by a false financial statement, everything that takes place thereafter in the conduct of that business is infected with the prior misrepresentation such that future conduct of the business, however legitimate, entails violation of the federal mail fraud statute every time a mailing occurs.

Observe what transpired here.

A broker made a deal with an insurance company, pursuant to which the broker was to retain the premiums he collected. Those funds constituted a loss reserve for the payment of both claims *and* expenses for the adjustment of those claims (Government Ex. 24, Tr. 831-835). Thereafter the lawyer who adjusted and settled a number of the claims mailed a letter. The letter instructed the broker to pay one such claim, and asked a modest fee for servicing a number of such claims.

According to the majority in the Court of Appeals, the letter furthered the scheme. That is to say, these schemers got together and dreamed up a clever plan whereby one of them could go to work for about a year, settling numerous insurance claims. Then, in implementation of his

original felonious intent to fool insurance brokers and public officials, he sought $1,000 in compensation for his services.[2] It became a federal crime when he sought that compensation by mail.

In *Parr* v. *United States,* 363 U.S. 370, this Court had ocasion to strike down a conviction for mail fraud predicated upon its earlier ruling in *Kann* v. *United States,* 323 U.S. 88, 95. In *Kann,* the court said:

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mail is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state laws."

Is it remotely conceivable that Wallace, had he reviewed the Sherre letter before Sherre sent it, might have mused, "Well, this letter certainly does help us execute our fraudulent intent to misrepresent our assets to brokers, agents, government agencies, and insurance companies."

The use of the mail as alleged in Count V was no more significant in the execution of a scheme to defraud than a letter sent out to pay Global's electric bill. An argument could be made that Global could not carry on its affairs if it had no electricity to operate its office typewriters, and that, accordingly, payment of the bill fur-

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[2] Sherre, a lawyer, emerges as an insurance adjustor. He brought four cartons of insurance claim files to court. If the count letter were from a lawyer, it might have read, "Services, legal, 1/1/65-1/1/66, $1,000." Instead, this financial buccaneer whimpers that he has got approval from everyone in the company to pay him the princely sum of $1,000 to process four *cartons* of claim files. The only detail missing from his letter is an explanation that he needs the money because his wife is pregnant for the fifth time. The jury was not heartless, acquitting Sherre of the count.

thered the scheme. There is nothing wrong with the argument, aside from the fact that it is infantile. Could the Congress, in enacting the mail fraud statute, have had this kind of mail use in mind?

Apparently in the present state of the law, something is or is not a fraudulent use of the mails depending upon the resourcefulness of the prosecution in generating far-fetched theories of criminal responsibility. This phenomenon prospers in the absence of any objective criteria supplied by this or any other court by which the matter may be judged.

While it would be presumptuous to suggest what such criteria might be, we would offer that at the very least, an objective observer reviewing the event, should be able to say, "that letter tends to further the commission of a fraud." If the letter tends to provide a claimant with whatever the claimant has a legal right to demand, and where the writer of the letter seeks reasonable compensation for having performed services for the claimant from a fund set up for that purpose, to call the activity "mail fraud" is itself deceitful. It is deceitful because it is obvious that the underlying purpose in calling such a letter "a letter in furtherance of a scheme to defraud" is nothing more than a transparent means of speciously subjecting the transaction to federal criminal jurisdiction.

Either the mail fraud statute is a statute which is calculated to sanitize the mails, in which the federal government has a colorable interest, or it is a shabby pretense for asserting federal jurisdiction over matters in which there is no legitimate *federal* interest. The holding in this case strongly suggests that the latter evaluation is closer to reality than the former.

Sherre, the author of the Count V letter, and the only one who sought to profit from its transmission, was acquitted on the count. In its opinion (App. A, pp. 9-10) the Court of Appeals justified the conviction of Wallace and the seemingly inconsistent acquittal of Sherre on the theory that Wallace was Sherre's co-conspirator (although no conspiracy was alleged) and that Sherre had been convicted of other counts (although Wallace was not) thus cementing a conspiratorial agency relationship between the two of them so that Wallace was vicariously liable for Sherre's letter, whether or not Sherre was.

This is an interesting extension of conspiratorial liability. In its simple application here: Sherre did nothing wrong in writing and sending the letter. But Wallace did something wrong in agreeing that Sherre could do something that it was not wrong for Sherre to do.

The court justified this in its original opinion on conspiracy principles. But in its ruling on Wallace's Petition for Rehearing, the court held that the conspiracy principle that a man cannot be guilty of a conspiracy where his alleged co-conspirator is acquitted did not apply to Count V, because Count V alleged a substantive offense, not a conspiracy, and inconsistent verdicts are permitted. (App. B, p. 31). The rule seems to emerge that conspiracy law applies to mail fraud where it permits conviction, but does not apply where its application would require reversal. Either that, or that Count V is a substantive count and it is not a substantive count.

While we tolerate a certain amount of contradiction in the law, we are unaware of any case save this in which it has been regarded with benediction.

The holding in the Court of Appeals as to Petitioner Wallace clears the way for the federal government to

prosecute local bucket-shop operators who pay their telephone bills by mail. It is safe to predict that the lore available in the opinion below will, unless rectified by this Court, generate future prosecutions entailing tangential use of the mail, and future petitions for certiorari to this Court complaining of federal encroachment upon areas reserved to the states.

The casual employment here of contradictory conspiracy law principles suggests an entirely new use for that body of law. It can proudly take its place with "Catch 22" as a device for superceding any claim whatever which is rooted in legal principle. Conspiracy law is thus not law. Like "Catch 22," it is the abrogation of law. For there cannot be a *legal* principle which, when we wish to call it forth, vitiates all legal principle. Such a principle would vitiate itself.

CONCLUSION

Wherefore, this Petition respectfully prays the Court to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, to the end that this case be reviewed and the conviction reversed.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner,
Harry Wallace

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1973 — JANUARY SESSION, 1974

Nos. 73-1014, 73-1015, 73-1016

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS E. JOYCE, BURTON SHERRE and HARRY WALLACE,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 CR 567
RICHARD W. MCLAREN, *Judge.*

ARGUED JANUARY 21, 1974 — DECIDED MAY 9, 1974

Before SWYGERT, *Chief Judge,* HASTINGS, *Senior Circuit Judge, and* CUMMINGS, *Circuit Judge.*

CUMMINGS, *Circuit Judge.* A 15-count mail fraud indictment was returned against defendants Joyce, Sherre, Wallace and Robert L. Ostrander. Ostrander pled guilty to count 14, but this count was dismissed as to the other

three defendants. Joyce was convicted under counts 1, 8, 9, 10, 11, 13 and 15; Sherre was convicted under counts 9, 10, 11 and 13, and Wallace was convicted under count 5.[1] The only prison terms imposed were on Joyce, who received a one-year sentence on count 1, and on Wallace, who received a one-year sentence on count 5. Fines and probationary terms were imposed upon Joyce and Sherre under the other counts. This appeal involves the validity of convictions under eight counts (counts 1, 5, 8, 9, 10, 11, 13 and 15) of the 15-count indictment.

Count I, the lead count of the indictment, charged that the four defendants (including Ostrander) devised a scheme to defraud firms engaged in the business of placing insurance risks, denominated in the indictment as "insurance brokers and agents," certain state department of insurance, denominated in the indictment as "state insurance agencies," and persons who were induced to purchase insurance policies from Global Surplus and Excess Limited (Global), a company organized in the Bahamas.

According to the lengthy allegations contained in count 1, defendants caused Trust No. 15385, an Illinois land trust, to be entered into between Global and the Cosmopolitan National Bank of Chicago. Thereafter, defendants represented that the trust was established to protect the United States and Canadian policyholders of Global. They also entered into an agreement giving Sherre a power of attorney to direct the trust. They conveyed certain Illinois real estate into the trust and represented that it was an asset of Global for the benefit of its policyholders. They had the Cosmopolitan National Bank circulate copies of

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[1] As explained *infra*, the district court granted post-trial motions of acquittal as to some of the other counts.

the trust agreement to insurance brokers and agents and state insurance agencies to induce them to place and permit the placing of insurance risks with Global. They prepared letters of appraisal for the trust real estate assigning an excess value thereto, and they caused the letters of appraisal to be circulated to insurance brokers and agents and state insurance agencies in order to induce them to use and permit use of Global. They also omitted to advise the insurance brokers and agents and state insurance agencies that some of the trust real estate was heavily mortgaged. They formed an Illinois corporation known as Global Surplus and Excess Limited of Illinois and represented that it was a holding company for the trust real estate. They were charged with making the following false representations in financial statements of Global:

1. The stock of Global Surplus and Excess Limited of Illinois was an asset of Global and had a value of $770,000.

2. Four vacant lots owned by Global in Kenosha County, Wisconsin, had a value of $60,000.

3. 41,250 shares of stock in Howard Savings and Loan Association of Chicago were owned by Global and had a value of $175,000.

4. 1,000 shares of stock in Wor-Wid Construction Company were acquired by Global in 1966 and had a value of $200,000.

5. Fifty shares of stock in Everlast Development Company of Illinois were acquired by Global in 1966 and were worth $150,000.

The grand jury also charged that defendants circulated these false financial statements of Global to insurance brokers and agents and to state insurance agencies. Defen-

dants allegedly converted funds deposited in the checking accounts of various banks that had been deposited for the protection of Global policyholders.

Each of the subsequent counts repeated these general allegations by reference. All fifteen counts alleged a different mailing in violation of 18 U.S.C. § 1341, the mail fraud statute.[2]

Various pre-trial motions of defendants were denied by the district court before the commencement of the jury trial. After a few trial days, the Government moved to dismiss count 2 as to all defendants and count 15 as to defendant Wallace, and the trial judge acceded. The jury found Joyce guilty on all counts (except the dismissed count 2). It found Sherre guilty on counts 7 through 15, and Wallace guilty on counts 5, 6 and 8. The district

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[2] Section 1341 of the Criminal Code provided as follows at the times of the mailings charged in the indictment:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

court granted Joyce's post-trial motions for acquittal as to counts 3 through 7 and 12 and 14. The court also granted Sherre's motion for acquittal on counts 7, 8, 12 and 14, and Wallace's motion for acquittal on counts 6 and 8. As noted above, Joyce is appealing his conviction on counts 1, 8, 9, 10, 11, 13 and 15; Sherre is appealing on counts 9, 10, 11, 13 and 15; and Wallace on count 5.

Defendants rather half-heartedly contend that the scheme was not proven because there is no showing that the misstatements of assets were made with intent to defraud rather than negligently. The magnitude of the misrepresentations is alone sufficient to support the jury's finding that they were not made negligently. Additional evidence of *scienter* is summarized *infra* at pp. 16-17 in the discussion of Sherre's separate contention that he was simply Global's attorney and was never aware of the fraud being perpetrated by his clients.

Defendants next contend that the evidence failed to sustain the charges concerning the individual mailings. In the interests of an orderly presentation, we will take up the counts assailed in numerical sequence.

Count 1

Joyce is the only defendant convicted under this count, which charged that Joyce and his co-defendants caused a letter to be mailed to Joyce from the Industrial Valley Bank & Trust Company.[3] The letter was addressed to

[3] The indictment refers to this bank as being "of Philadelphia, Pennsylvania"; the bank officer testified that the letter was mailed from the suburban Marion, Pennsylvania, branch. Defendants do not assail this discrepancy.

Joyce by W. Kenneth Clark of that bank and agreed to send Joyce duplicate statements of Global's account with the bank commencing with the May 1966 statement. The Government has argued that the letter furthered the scheme because it was essential for Joyce to keep track of the balance in the account so that he and other defendants could withdraw funds from the account for their own use, although they represented that it was to be a reserve to pay losses. Since the district court found that Joyce had drawn a $2,359.65 check on the account payable to American Express, it concluded that " a reasonable mind could thus have fairly found beyond a reasonable doubt that the count letter was incident to an essential element of the conversion scheme—knowledge of the balance in the account."[4] We agree that the trier of fact could have drawn the inference that the American Express check was not drawn to pay a policyholder's claim. Whether the check paid for business or personal expenses is of no moment—either use is inconsistent with maintenance of the account as a loss reserve for policyholders.[5]

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[4] The check payable to American Express is the only one of a series of checks drawn on the account (Govt. Ex. 116) on which both the payee and the date are legible. The district judge relied on this check because it was dated later than the count letter. We note that there are also six checks with illegible dates (but lower check numbers than the check to American Express) payable to defendants: two to Thomas Joyce, two to Burton Sherre, and two to Robert Ostrander.

[5] Consequently, it is unnecessary to accept the Government's additional argument that Joyce required these bank statements in order to misrepresent the balances on deposit in that bank.

Conceding this *arguendo,* Joyce argues that he only requested a bank statement, and that the mailing charged was not a bank statement, but an unexpected acknowledgment of his request—a mere courtesy letter. He argues that he did not cause the mailing of the courtesy letter, and that the courtesy letter could not have furthered the scheme. However, the letter was more than a mere acknowledgment; it also informed Joyce that there would be a $1 per month fee for the service he requested. It was foreseeable that there would be a charge, and that the bank would not impose the charge without an explanation. Joyce could thus foresee that his request would cause the mailing of a letter advising him of the fee, and this is sufficient. "[O]ne 'causes' the mails to be used where he 'does an act with knowledge that the use of mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended * * *.'" *United States* v. *Maze,* ..... U.S. ....., 42 L.W. 4113, 4114, quoting from *Pereira* v. *United States,* 347 U.S. 1, 9. The count letter also furthered the scheme since it was impossible for Joyce to obtain the needed bank statements without causing the mailing of the count letter.

As to the proof of mailing of this count letter, witness Clark testified that he dictated the letter and that his secretary's practice was to send out all dictated letters (other than interoffice correspondence) by mail. Testimony as to office practice is sufficient proof of mailing. *United States* v. *Shaven,* 287 F.2d 647, 652 (7th Cir. 1961); *United States* v. *Silvern,* ..... F.2d ....., No. 72-1133, slip op. at 9-10, reheard *en banc* on other grounds, 484 F.2d 879 (7th Cir. 1973); *United States* v. *Flaxman,* ..... F.2d ....., No. 73-1616, slip op. at 6-7 (7th Cir. 1974). While the evidence

in those cases was somewhat stronger than here, we hold that Clark's testimony was sufficient proof of mailing. Even weaker proof of mailing was held sufficient on some counts in *King* v. *United States,* 25 F.2d 242, 244 (6th Cir. 1928).

Joyce also contends that venue has not been established despite the showing that the usual procedure was to mail such a letter from Pennsylvania to the recipient at the address shown on the letter, here 7019 West Higgins Avenue, Chicago, Illinois 60656. In the normal course of the mails, we presume that a letter is sent to the address shown, so that venue was adequately established. Cf. *Grannis* v. *Ordean,* 234 U.S. 385, 397-398; *Henderson* v. *Carbondale Coal & Coke Co.,* 140 U.S. 25, 37; *Marston* v. *Bigelow,* 22 N.E. 71, 73, 150 Mass. 45 (1889). In any case, the district court properly held that Joyce waived his objection to proof of venue by failing to make it after the Government rested or in his motion for acquittal at the close of all the evidence. 1 Wright Federal Practice and Procedure, Criminal § 306 at 600-601 (1969).

Count 5

Wallace is the only defendant presently convicted under count 5. That count charged defendants with the December 21, 1966, mailing of a letter to International Excess Agency, Inc. in Cleveland, Ohio. The letter was from Burton Sherre to Mr. Paterson of the International Excess Agency. It stated that Wallace, Joyce and Ostrander had agreed that some of the cost of Sherre's legal services should come from Global funds held by Paterson's office. This request was refused by Paterson because the Ohio Department of Insurance had asked him to keep all Global funds in escrow. With Wallace's and Joyce's consent, Sherre was attempting to obtain for himself funds

that were segregated for the benefit of policyholders' claims in Ohio. The letter thus falls within the conversion scheme alleged.

At the time this letter was sent, Wallace was still active in Global's affairs. As a member of a mail fraud scheme, Wallace was responsible for any letter which any other member of the scheme caused to be mailed in execution of the scheme. *Pritchard* v. *United States,* 386 F.2d 760, 764 (8th Cir. 1967), certiorari denied *sub nom. Borchelt* v. *United States,* 390 U.S. 1004; *Babson* v. *United States,* 330 F.2d 662, 665 (9th Cir. 1964), certiorari denied, 377 U.S. 993; *Sherwood* v. *United States,* 300 F.2d 603, 605 (5th Cir. 1962), certiorari denied, 371 U.S. 838; *Blue* v. *United States,* 138 F.2d 351, 358 (6th Cir. 1943), certiorari denied, 322 U.S. 736; *Tincher* v. *United States,* 11 F.2d 18, 21 (4th Cir. 1926), certiorari denied, 271 U.S. 664; *Silkworth* v. *United States,* 10 F.2d 711, 717 (2d Cir. 1926), certiorari denied, 271 U.S. 664; cf. *Kann* v. *United States,* 323 U.S. 88, 93. In its memorandum opinion of August 10, 1973, the district court stated that it had erroneously granted Joyce's motion for acquittal on count 5 since the Government had not drawn its attention to the language in the count 5 letter stating that Joyce had also agreed to Sherre's request. But under the rule just stated, each schemer was responsible for Sherre's acts in furtherance of the common scheme, whether or not he knew of or agreed to the specific mailing. We have been directed to no 7th Circuit cases applying this rule in the absence of a separate count charging conspiracy; somewhat surprisingly, the issue appears not to have arisen in this Court. But we have upheld the admissibility of hearsay declarations by persons shown to be coconspirators in cases where conspiracy was not charged. *United*

States v. *Jones,* 438 F.2d 461, 466 (7th Cir. 1971); *United States* v. *Blue,* 432 F.2d 1191, 1194 (7th Cir. 1970), certiorari denied, 401 U.S. 921; *United States* v. *Bernard,* 287 F.2d 715, 719-721 (7th Cir. 1961), certiorari denied, 366 U.S. 961. We therefore have no hesitation in joining at least six other circuits in applying conspiracy principles to a multi-member mail fraud scheme. The nature of the group activity is the same whether or not a conspiracy is charged.

Count 8

Joyce is the only defendant whose conviction was left standing under count 8. This count charged that Joyce and the other defendants caused International Excess Agency of Cleveland, Ohio, to mail Joyce a copy of its letter of February 16, 1967, to Carl Brown in St. Louis, Missouri, enclosing a copy of Joyce's false statement of assets, so that Brown could secure approval for Global to do business in Missouri. This of course furthered the scheme. Perhaps recognizing that the sending of a copy of this letter to Joyce helped him keep track of who had been told what in the scheme of misrepresentations, his brief merely states that it is "inconceivable that a carbon copy of a letter to an alleged schemer could in any way have furthered the scheme charged." We find it quite conceivable.

Joyce is somewhat more persuasive in his contention that proof of mailing of this count letter was lacking. The Government concedes that the proof of mailing as to count 8 is "possibly the most circumstantial." The trial court granted Sherre's and Wallace's post-trial motions for acquittal on count 8, stating "the government merely proved the mailing of a letter from Cleveland to St. Louis, Missouri, which bore the notation 'cc: Mr. Thomas Joyce.'

This is not a sufficient basis for a reasonable inference that a copy was mailed to Joyce." We disagree, for the witness Paterson testified that the notation meant a carbon copy was directed to Joyce, and that the customary procedure was to place such a copy in a separate pile of mail going to Joyce or Global, and then to mail the pile in one envelope. That was sufficient. *United States* v. *Shaven, supra.* Since the copy was sent to Joyce in Chicago, venue was present.

Count 9

This count involves both Joyce and Sherre. It charges that the defendants caused the Cosmopolitan National Bank of Chicago to send a letter to E. P. Littlejohn & Company in Marshall, Texas, telling the addressee that the beneficiary of Trust No. 15385 was Global and that the party to contact under the trust was Burton Sherre at 7019 West Higgins Avenue, Chicago. Neither defendant contends that the letter was not in furtherance of the scheme. They do contend that there is no proof of mailing of this count letter. Corrinne Bek, assistant vice president of the bank and sender of the letter, testified that the signed letter was placed in an enveolpe and put in the "outbox going out for the mail" and that the bank's mail boys would "pick it up, * * * run it through the postage meter and then * * * bag the mail and take it to the Oak Street Post Office." Under *United States* v. *Shaven, supra,* this was sufficient proof of mailing. Defendants argue that there is no evidence Miss Bek testified of her own knowledge, but she purported to do so, and in the absence of some indication that she only knew what the mail boys told her, we assume she knew the procedures in her own office. We doubt that defendants seriously disagree, since Miss Bek was not cross-examined as to the source of her

knowledge. Mailing can be proved by office custom without producing as a witness the person who personally placed the letter in a United States mailbox. *United States* v. *Flaxman, supra.*

Counts 10 and 11

Both Joyce and Sherre were convicted under counts 10 and 11. These counts concern a written inquiry and a letter forwarding the inquiry and therefore will be considered together. The count 10 letter is from B. Carvalho of the Bala-Cynwyd, Pennsylvania, company bearing his name, and is addressed to the Cosmopolitan National Bank. The letter states that Carvalho & Company, Inc. is a correspondent of Global and "its largest producer of premiums" and that it would like to know the status of Trust 15385. The count 11 letter is Miss Bek's letter of Global, attention of defendant Sherre, stating that the inquiry should receive his immediate attention. Since defendants were inducing insurance brokers to rely on this trust as a protection for policyholders, the count 10 letter was certainly foreseeable. The letter was written at a time when Carvalho was attempting to have defendant pay for losses claimed by policyholders, so that he was of course interested in the assets of the trust. Part of the trust agreement with the Cosmopolitan Bank was to forward correspondence concerning the trust to defendant Sherre. This enabled defendants to continue their misrepresentations about the trust instead of permitting the bank to divulge its true value. The jury was entitled to consider these letters as furthering the scheme.

As to proof of mailing, Carvalho testified that he or his secretary would take outgoing mail to the post office at the end of each day and that this procedure was followed with respect to the count 10 letter. He further testified that the letter, which was found in the files of

the Cosmopolitan National Bank, was not hand-carried from Pennsylvania to Chicago. The proof of mailing was accordingly sufficient.

With respect to the count 11 letter, the proof of its mailing was supported by Miss Bek's testimony about office procedure described under count 9, and her testimony that she put the count 11 letter into the normal course of that procedure.

Defendants' argument that counts 10 and 11 deal with the same letter so that they cannot be separately and cumulatively punished for each count is too frivolous to require treatment under a separate heading. The substantive offense is use of the mails, and "there is no doubt that the law may make each putting of a letter into the post office a separate offence." *Badders* v. *United States*, 240 U.S. 391, 394.

Count 13

Joyce and Sherre were convicted under this count which involved a letter from Morton Olken to defendant Ostrander. The count letter is a copy of this letter allegedly sent by Olken to Fred Pearson at 223 West Jackson Boulevard in Chicago. The letterhead was that of Atlantic Insurance Agency, Inc., Chicago, Illinois. Although Pearson testified that the letter had been opened by his mail department and stamped accordingly, he also stated that the mail department opened and stamped privately delivered letters as well as letters received through the mail. He concluded that it was possible that Olken dropped the letter off at his office. Particularly since both men's offices were in Chicago, we cannot accept the district court's view that Pearson's doubt was no greater than the possibility of error "inherent in any situation where

the government seeks to prove mailing by evidence of customary procedures." Since the only witness had a reasonable doubt whether the letter was mailed, the jury had to speculate to reach its verdict. We hold that the Government did not sufficiently show that the mails had been used with respect to this communication. We need not consider defendants' additional contention that this letter did not further the scheme.

Count 15

Joyce and Sherre were also convicted under this count, which charges defendants with causing a February 29, 1968, letter to be sent by Sherre to E. P. Littlejohn & Son in Marshall, Texas. In the count letter, Sherre stated that Global had received from Cosmopolitan a copy of an unpaid claimant's letter sent to Cosmopolitan. The original of that letter had been sent to Littlejohn, stating, according to the count letter, that the complaining insurance broker was "quite concerned over not being paid on a claim." Sherre admonished Littlejohn that "unfortunately this type of letter [from the claimant] may perplex our bank." The letter could be deemed in furtherance of the scheme because defendants would not wish the Cosmopolitan to correspond with brokers and divulge the true value of the trust. Defendant Sherre testified that he did not hand this letter to Littlejohn but "in all probability mailed it to him." This was sufficient proof of mailing.

Applicability of United States v. *Maze.*

At the oral argument, the parties discussed the impact of *United States* v. *Maze,* ..... U.S. ....., 42 L.W. 4113, on this case. There the Supreme Court held that the mail fraud statute was not violated where respondent had used

a stolen credit card at motels that thereafter mailed the underlying sale invoices to an out-of-state bank. The Court held that the mailings were not "for the purpose of executing such scheme" (18 U.S.C. § 1341) because respondent's scheme had reached fruition when he checked out of the motels and "the mailings from the motel owners here to the Louisville bank increased the probability that the respondent would be detected and apprehended" (42 L.W. at 4115). In contrast to *Maze,* the scheme here was to earn profits by persuading people to place insurance with the under-capitalized company. Therefore, any letter which was incident to the running of Global and which tended to give the impression that all was well, that risks were adequately protected, and that business was being transacted normally, was in furtherance of the scheme under prior Supreme Court cases approved in *Maze.* While inquiries to Cosmopolitan were aimed at detecting any fraud which might exist, it was necessary to permit such inquiries to persuade some victims that the trust was as represented. Defendants were found to have arranged favorable replies to such inquiries, so that these mailings were also in furtherance of the scheme. *Maze* does not affect the foregoing analysis of the mailings involved in this appeal.

Pre-Indictment Delays

Defendants claim that their rights under the Sixth Amendment and Rule 48(b) of the Rules of Criminal Procedure were violated by the 34-month delay between the first presentation of the case to the grand jury and the return of the indictment. However, *United States* v. *Marion,* 404 U.S. 307, establishes that the Sixth Amend-

ment speedy trial provision has no application until defendants are accused, either by indictment, information, or arrest. *Marion* also decided that Rule 48(b) is limited to post-arrest situations. *Id.* at 319. Defendants claim that they were accused when the case was first presented to the grand jury. But *Marion* clearly did not consider such "targeting" an accusation which triggers the right to a speedy trial. In *Marion,* newspapers stories in October 1967 quoted the United States Attorney as saying the matter was under investigation and indictments would be forthcoming. In summer 1968, Marion delivered his company's records to the United States Attorney and was interviewed about the case. *Id.* at 309. The Court held that there was no accusation until Marion was indicted on April 21, 1970. *Id.* at 313.

The *Marion* opinion did say that the due process clause requires dismissal of an indictment if pre-indictment delays caused substantial prejudice to defendants' right to a fair trial and were an intentional device to gain tactical advantage over them. *Id.* at 324. Here the pre-indictment delays did not extend beyond the period of the applicable statute of limitations, and *Marion* clearly implies that the limitations period is the only protection against delay unless specific prejudice is shown. Two district judges, one before trial and one after, independently examined defendants' claims of prejudice and found them insubstantial. We agree. The only specific complaint is that two witnesses died. The first, a Mr. Black, would allegedly testify that he filed Global's financial statement with the Pennsylvania Insurance Department, even though Joyce told him not to file it because it was erroneous. Since Global did business in Pennsylvania, defendants had to know that papers had been filed with the Pennsylvania

Insurance Department, and they could have shown any attempts to correct Black's misstatements by cross-examining the witness from the Department. Defendants' only argument as to the second witness, John Carvalho, is that witness Paterson testified to many conversations to which Carvalho was a party. While it might have been helpful to defendants to question Carvalho, their due process rights were protected by cross-examination of Paterson. It is also significant that defendants' brief indicates that Carvalho died "around 1968," so that even if the Government had proceeded much more quickly than it did, Carvalho would probably have died before trial.

Nor is there any showing of intentional delay by the Government. The voluminous transcript and exhibits show that this scheme was a complex one that must have required a lengthy investigation. Judge Marovitz found that the first grand jury to hear the case did not indict, but designated a postal inspector to investigate further. Defendants' due process claims based on *Marion* cannot be sustained.

Post-Indictment Delays

Defendants also complain of the 12-month delay between their indictment and trial. The leading case in this area is *Barker* v. *Wingo*, 407 U.S. 514, where the Court held that the constitutional right to a speedy trial must be determined by weighing the conduct of the prosecution and that of the defendant in the light of four factors: "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 530. A 12-month delay, while not insignificant, is not extreme. In *Barker*, the delay was well over five years, but other factors led the Court to find no denial

of a speedy trial. In *United States* v. *DeTienne,* 468 F.2d 151 (7th Cir. 1972), we found a 19-month delay justified.

The reasons for the delay are attributable in varying part to the defendants, the Government, the district court's docket, and the complexity of the case. Of course, more delay is tolerable in a complex case. 407 U.S. at 531. Defendants' first round of pre-trial motions, originally due July 1, 1971, were not all filed and briefed until August 23. The Government was given ten days to respond, and took thirty; defendants' reply was due five days thereafter, but was not filed for twenty days. At each step the district judge granted extensions or accepted late filings, and this appears reasonable in light of the number and complexity of the motions. The motions were finally ruled on on November 19 and the case was set for trial on January 31, 1972. At this point the Government requested a continuance, explaining that the attorneys responsible for the case were involved in lengthy trials before other judges of the district court which would persist until just before January 31. According to the docket sheet, this was its only such request. The trial was reset for March 6, and the Government's attorneys agreed to meet at night during their other trials to negotiate stipulations on technical aspects of the case. Shortly thereafter the case was reassigned to a newly appointed judge who could not try it on the day set. *Barker* indicates that delay due to reasons such as overcrowded courts should be considered against the Government, but should not be weighed very heavily. 407 U.S. at 531. The case did proceed to trial as soon as the new judge had a date available; defendants continued to file additional pre-trial motions until the eve of the June 15th trial.

Although defendants did make a timely assertion of their right to a speedy trial, they have not satisfactorily shown actual prejudice. There is no allegation of specific prejudice from post-indictment deaths and the likelihood that memories faded over the total four-year period. Because prejudice was so slight, because only part of the delay is attributable to the Government, and because there is no indication that the Government-caused delay was deliberate or due to culpable negligence, we do not consider this a close case. The right to speedy trial was not violated.

Denial of Severance

Defendants insist that the district court should have granted their motion for severance because Wallace took the stand and blamed the scheme on Joyce. This is an insufficient reason to require a separate trial. *United States* v. *Hutul,* 416 F.2d 607, 620 (7th Cir. 1969), certiorari denied *sub nom. Sacks* v. *United States,* 396 U.S. 1007; *United States* v. *George,* 477 F.2d 508, 515 (7th Cir. 1973). Furthermore, Joyce's attorney did not bother to cross-examine Wallace to show that the jury should disbelieve his testimony. It is said that this was because Joyce himself was absent, but after Wallace's direct testimony and before his cross-examination, Joyce executed a written waiver of his right to be present, even though his hospitalization would almost certainly have justified a continuance or severance if requested. In any event, if Joyce had been severed and Wallace's trial completed, Wallace's testimony would have been available to the Government at Joyce's second trial.

Finally, it is no justification for severance that Joyce and Sherre wanted a bench trial, while Wallace insisted on a jury trial. There is no right to a bench trial (*Singer*

v. *United States*, 380 U.S. 24), and avoidance of duplicate two-week trials is certainly a legitimate reason for withholding consent to the proffered jury waiver. We conclude that Joyce has not shown sufficient prejudice to justify reversal.

Sufficiency of Evidence as to Sherre

Sherre attempts to void his conviction by claiming a lack of knowledge during his association with Global. The evidence refutes this claim. Sherre was centrally involved in the scheme, since he handled most of the correspondence from Global's Chicago office. It would be extraordinary if he never learned what was going on. This does not mean he can be convicted by association, but it does increase the significance of any evidence tending to show his actual knowledge of the scheme's nature.

According to the credited testimony, Sherre was first involved in this scheme in May 1965. On May 26, he was at a meeting with Joyce, Ostrander and Wallace and a Mrs. Chambers. Joyce told the others that he would place certain property, which he described to the group as worth more than $750,000, into the trust fund at Cosmopolitan. In Sherre's presence, he then dictated a letter describing the trust property as worth $1,180,000. In the presence of Sherre and the others, Mrs. Chambers typed the letter and signed the name Raymond Kusniar to it.

A Mrs. Lewis testified that in November 1965, she met with Sherre, Joyce and Ostrander. She warned all three that they were under government scrutiny and that there was particular concern about the land trust. She also complained about not being paid, and in Sherre's presence, Joyce told her that Global was insolvent. She responded that there had been "several occasions" when it had enough money to pay her.

Sherre had the power of direction over the trust at Cosmopolitan. As an attorney, he must have known that Cosmopolitan, as trustee of an Illinois land trust, was completely subject to his directions on behalf of Global, and had no independent power to protect the policyholders. Sherre wrote the count 15 letter, urging brokers not to correspond directly with Cosmopolitan, which indicates he was aware that Cosmopolitan would not support Global's representations.

The evidence concerning Sherre's involvement justified the jury's conclusion that he participated in the common plan to defraud with the requisite criminal intent.

Evidentiary Rulings

Defendants protest that appraisal evidence should not have been received because the Government inadvertently failed to disclose the appraisals to defense counsel. Rule 16(g) of the Federal Rules of Criminal Procedure offers a district judge four sanctions for a violation of the Government's duty to disclose. Here the judge chose one of the alternatives, namely, a continuance as to the appraisal witness, to give defendants time to prepare for cross-examination. Defendants declined the continuance. Therefore, there was no error in receiving the appraisal testimony.

Asserting a hearsay objection, defendants complain that witness Minner, the chief of the Surplus Lines Division for the Pennsylvania Insurance Department, was permitted to read from Government Exhibit 145, in which the Royal Bank of Canada advised the Pennsylvania Insurance Department that Global no longer had any account with that bank. Since none of defense counsel objected

to the receipt of Exhibit 145 in evidence, it was accordingly received. Once the exhibit was in evidence and could go to the jury, it can not have been error to allow Minner to read from it. Furthermore, the hearsay objection was not made below. Defendants' only complaint was that the reading of the exhibit on redirect was outside the scope of cross-examination.

Defendants also assail the testimony of Mrs. Lewis discussed *supra* at p. 16. Such testimony bore on *scienter* and therefore was properly admitted.

Finally, it is complained that witness Paterson was permitted to testify that in addition to $2500, his company "lost a great deal else in the way of reputation." Since the mail fraud statute covers "any scheme or artifice to defraud, *or* for obtaining money or property" (note 2, *supra;* emphasis added), the Government did not have to confine its proof to monetary loss. Cf. *United States* v. *Rowe,* 56 F.2d 747, 749 (2d Cir. 1932).

Instructions to Jury

First of all, defendants complain of Government Instruction No. G-31 which defined "scheme to defraud" and was substantially the same as LaBuy Jury Instruction 16.02, 36 FRD 601. The last sentence reads "It is essential only that one or more of them [pretences, representations and acts charged in the indictment] be proved to show the existence of the scheme." Defendants suggest that this is erroneous because it would permit the jury to convict where only part of a scheme was proved. On the contrary, it is well established that every allegation of an indictment charging a scheme need not be proved in order to convict. *Schaefer* v. *United States,* 265 F.2d 750, 753 (8th Cir. 1959), certiorari denied, 361 U.S. 844; *Myrick* v. *United States,* 332 F.2d 279, 281 (5th Cir. 1963),

certiorari denied *sub nom. Bergman* v. *United States*, 377 U.S. 952. We would prefer that the instruction be modified in the future to track more closely the cases cited, so as to avoid any possible implication that the jury must find a scheme if it finds that any one allegation of the indictment is proved. The *Schaefer* version of this instruction avoids that ambiguity by providing that the government must "prove one or more of a sufficient number of the representations to indicate and show that the scheme alleged was actually set up * * *." 265 F.2d at 753. While such a variation of the LaBuy instruction would be more appropriate, the chance that the instruction given was misunderstood is not great enough to rise to the level of reversible error. Moreover, no objection was made to the instruction, as required by Rule 30 of the Federal Rules of Criminal Procedure, so that any error in this regard was waived. *United States* v. *Zweig*, 467 F.2d 1217, 1222 (7th Cir. 1972), certiorari denied, 409 U.S. 1111.

Defendants also object to the court's use of the following sentence from LaBuy Instruction 4.05 (33 FRD 553):

> "No person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate."

We adhere to *United States* v. *Grizaffi*, 471 F.2d 69, 75 (7th Cir. 1972), certiorari denied, 411 U.S. 964, upholding the propriety of this instruction. See also *United States* v. *Squires*, 440 F.2d 859, 864 (2d Cir. 1971).

Defendants assail one sentence from the court's charge with respect to reasonable doubt[6] but ignore other in-

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[6] The sentence in question provides:

> "Indeed the law requires a conviction where there is sufficient legal evidence to show the defendant is guilty beyond a reasonable doubt."

structions concerning reasonable doubt that were also given.[7] Defendants assert too that the portion of the reasonable doubt charge quoted in note 6 is contradicted by a later portion of the charge concerning evidence of good character.[8] In our judgment, these instructions taken together were not so confusing or contradictory as to prejudice the defendants. We think the jury properly understood these later instructions to modify, rather than contradict, the instruction in note 6. But that instruction would be better worded if it avoided the troublesome phrase "sufficient legal evidence" and simply told the jury that it must convict if persuaded of guilt beyond a reasonable doubt.

The majority concurs in Part III of Chief Judge Swygert's dissent. The views there expressed apply with

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[7] For example, defendant's Instruction No. 15 provided:

> "You cannot find any defendant guilty unless you believe beyond a reasonable doubt that he acted with the requisite intent. Evidence of a defendant's relationship with Global Surplus and Excess Ltd. and his stake or lack of one in the financial success of that enterprise may be considered on the issue of intent. If you believe that a defendant lacked the requisite intent, then, as I indicated, it is your duty to find him not guilty."

A similar instruction was given on good character (note 8, *infra*), and on good faith.

[8] The supposedly contradictory sentence provides:

> "The circumstances may be such in a particular case that evidence of good character may alone create a reasonable doubt of defendant's guilt, although without it the other evidence would be convincing."

equal force to counts 5 and 8. The difference between us is only that we do not believe the jury's verdict on those counts *is unsupportable* as a matter of law.

For the foregoing reasons, the judgments are affirmed except that Joyce's and Sherre's convictions under count 13 are reversed.

SWYGERT, *Chief Judge*, dissenting in part.

I respectfully dissent in part. I cannot agree with the majority that there was sufficient evidence to support a conviction of Wallace on Count 5 and Joyce on Count 8, and accordingly I would reverse the convictions on these counts.

I

Count 5, briefly restated, charged all four defendants with the mailing of a letter to Tom Paterson of International Excess Agency, Inc., Cleveland, Ohio from codefendant Burton Sherre. In his letter, Sherre represented that codefendants Wallace, Joyce, and Ostrander agreed that "some of the cost" of Sherre's legal fees for settling claims should come from Global funds held by International. The sum of $1,000 was specified. Sherre was found not guilty on this count by the jury, and the trial judge granted Joyce's post-trial motion for judgment of acquittal. Thus Wallace is the only defendant who now stands convicted under Count 5.

The majority has affirmed Wallace's conviction upon a finding of the following: Wallace was active in the affairs of Global at the time the letter was sent; the count letter falls within the conversion scheme; and Wallace was responsible for any letter which any other member of the scheme caused to be mailed in execution of the scheme.

I am unpersuaded that the count letter falls within the conversion scheme. The scheme as outlined in the indictment alleges that Global Surplus and Excess had represented that defendant held out inflated and non-existent assets to insurance brokers and state insurance agencies. The scheme was not use of the mails to defraud by settling claims and seeking payment from retained premiums to pay legal counsel. The letter upon which the conviction under Count 5 is based is solely an effort by Sherre to secure compensation for legal services rendered in effecting settlement of claims.

Assuming, *arguendo,* that the count letter can be said to fall within the conversion scheme, I cannot agree that the Government proved Wallace was in any way responsible for the letter. That letter, written by Sherre, merely indicates that Wallace along with the other codefendants, agreed to Sherre's request made to Paterson. Conspicuous by its absence from the record, however, is any evidence of the following: that Wallace and the other codefendants had in fact agreed on how Sherre should be compensated for his services; that Wallace knew of the letter or of its mailing; that Wallace asked Sherre to send the letter; or that Wallace in any way ratified Sherre's letter. Reliance upon the language in the letter wthout more is insufficient to support a finding of authorization or ratification by Wallace for the mailing of the letter.

I also harbor doubt as to how active Wallace was in the affairs of Global at the time the letter was sent since the record is replete with evidence that Wallace at the time was estranged from his codefendants.

II

I am additionally disposed to disagree with the majority in their affirmance of Joyce's conviction on Count 8. That count charged defendants with causing International to

send Joyce a copy of its letter to Carl Brown of Royal Excess Underwriters, St. Louis. The count letter informed its recipient that a financial statement of Global was enclosed with the consent of Joyce. Joyce is the only defendant who now stands convicted under this count. His co-defendants were acquitted on the count on the basis of their post-trial motions.

Setting aside the question of whether the letter can be construed as a part of the scheme alleged in the indictment, I find the record will not support a conclusion that there was sufficient evidence to establish proof of mailing a copy of the letter to Joyce or his receipt of it. The concession by the Government, "that the proof of mailing as to Count 8 is probably the most circumstantial" is close to demonstrating the vulnerability of the proof of mailing.

The Government unsuccessfully attempted to establish proof of mailing through the testimony of Tom Paterson who directed a subordinate to draft the letter and enclose a financial statement of Global. While Paterson testified to the customary procedures for mailing letters and copies in his office, it is significant that he did not personally prepare the letter and that he did not know whether he was in his office on the date shown on the letter. In this posture, Paterson could not say that a copy of the letter was ever mailed or received by Joyce in Chicago. No other testimony was offered by the Government to establish proof of mailing. The notation in the count letter "cc: Mr. Thomas Joyce" standing by itself is an insufficient basis from which to conclude that a copy was mailed to Joyce. Accordingly, the conclusion is inevitable that even when the evidence is viewed in a light most favorable to the Government, the record will not support a reasonable inference that a copy of the letter was sent to Joyce.

After the notice of appeal had been filed in this court, we remanded to the district court for the limited purpose of disposing of certain post-trial motions filed by Joyce. On remand a motion for judgment of acquittal on Counts 3 through 7 and 12 and 14 (on which Joyce had been found guilty) was granted. The district court denied the motion as to Count 8.

Later, Joyce's codefendant secured a similar remand to the district court. The motion for acquittal on Count 8 was granted to Joyce's codefendants Sherre and Wallace. In ordering acquittal, the district judge stated:

> Count 8 alleges that defendants caused a letter to be mailed from Cleveland, Ohio, to defendant Joyce in this district. No such letter was ever offered in evidence. Instead, the government merely proved the mailing of a letter from Cleveland to St. Louis, Missouri, which bore the notation "cc: Mr. Thomas Joyce." This is not a sufficient basis for a reasonable inference that a copy was mailed to Joyce. Without such an inference, a reasonable mind could not fairly conclude that the evidence showed the essential element of mailing beyond a reasonable doubt.

Afterward, Joyce asked for equal treatment. His request was denied, the judge reasoning that the district court had lost jurisdiction over Joyce because the limited remand as to him had terminated when his post-motions had been acted upon. This recitation of facts clearly demonstrates the unfairness to this defendant through an affirmance of Count 8.

Moreover, since the record is barren of any evidence to establish that Joyce ever received a copy of the letter in Chicago, it must be concluded that proper venue has not been established.

III

Although I do not dissent from the affirmance of the convictions under Counts 1, 10, and 11, I am troubled by them.

In my opinion, the Government has stretched to the breaking point the mail fraud statute by using as the count letter in Count 1 the acknowledgment from W. Kenneth Clark of the Industrial Valley Bank and Trust Company, Philadelphia, of Joyce's request for a monthly bank statement of the Global account. The acknowledgment letter was only tangentially related to the fraudulent scheme. I believe the intent of the statute would be better served by using mailings that have something more than a strained relation to the scheme, and not a miscellaneous, random piece of correspondence that requires tortuous reasoning on the Government's part to sustain the conviction.

The foregoing observation is equally applicable to Counts 10 and 11 where the count letter in Count 10 becomes the underlying basis for Count 11 since the latter count dealt with merely a forwarding of a photostatic copy of the Count 10 letter from the original addressee, Cosmopolitan National Bank, to Global. If the copy of the original letter had been forwarded several times through the mail, presumably the Government would have been able to indict for each separate mailing. It seems to me the prosecutor has a responsibility to exercise restraint and should not approve indictments on essentially irrelevant or duplicative mailings in order to increase the number of counts.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

June 4, 1974

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 73-1015 vs.

HARRY WALLACE,

Defendant-Apppellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71 CR 567

Richard J. McLaren, Judge.

ORDER

Wallace's petition for rehearing asserts that he must be acquitted on Count 5 since the jury acquitted codefendant Sherre and since the district court "erreoneously" acquitted codefendant Joyce on that count (see p. 7 of

slip opinion). His claim is wide of the mark, for Count 5 is a substantive count, making inapplicable the federal rule that a jury may not convict one defendant of conspiracy and acquit his alleged conspirators.

When, as here, the jury found a scheme to defraud and that Wallace, Sherre and Joyce joined it,* any inconsistency in its verdict as to one of the substantive crimes in furtherance of the scheme is governed by *Dunn* v. *United States*, 284 U.S. 390. Furthermore, this point was not previously raised and comes too late.

The petition for rehearing is denied.

Chief Judge Swygert voted to grant the petition for rehearing.

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* Sherre remains convicted on Counts 9, 10, 11 and 15 and Joyce on Counts 1, 8, 9, 10, 11 and 15.

APPENDIX C

EXTRACT FROM ORDER OF TRIAL JUDGE DATED JUNE 1, 1973

In granting the defendant Joyce's post-trial motion regarding Count Five, the trial judge set forth the following in his Memorandum Opinion and Order of June 1, 1973:

> "Count V charges the mailing of a letter (Ex. 28-A) from defendant Sherre to Thomas Patterson, a broker for Global, asking for funds from an account into which Patterson had been depositing a portion of the Global premiums. The government asserts that the letter represents an attempt by defendant Sherre to convert the premiums. The fact that defendant Sherre was found not guilty on this count (perhaps due to his defense of good faith), is not dispositive; it is well-settled that there is no requirement of rational consistency in verdicts. The real difficulty with holding defendant Joyce accountable for the Count V letter, even if it is assumed that it was mailed for the purpose of executing a scheme to convert the premiums, is that there is no evidence tending to show that Joyce caused the mailing in the sense that he knew or should have foreseen that Sherre would write such a letter. *Pereira, supra,* at 8-9. Accordingly, the Court concludes that the government's proof as to Joyce on Count V was insufficient to support his conviction."

APPENDIX D

EXTRACT FROM ORDER OF TRIAL JUDGE DATED AUGUST 10, 1973

In denying the defendant Wallace's post-trial motion regarding Count Five, the trial judge set forth the following in his Memorandum Opinion and Order of August 10, 1973:

> "In its opinion of June 1, the Court concluded that the proof on this count was insufficient to support defendant Joyce's conviction because there was no evidence tending to show that he caused the mailing in the sense that he knew or should have foreseen that Sherre would write such a letter. Although it did not do so in opposing Joyce's motion, the government has now drawn the Court's attention to language in the count letter stating that defendants Joyce and Wallace agreed to the request made therein. This clearly provides a sufficient basis for the jury to have found beyond a reasonable doubt that those defendants should have foreseen that Sherre would mail such a letter. Defendant Wallace's motion therefore will be denied as to Count 5."

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1947

THOMAS E. JOYCE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1980

HARRY WALLACE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the evidence was insufficient to support their convictions. Petitioner Joyce also contends that he was denied the right to a speedy trial and to cross-examine a witness, and that it was error to convict him of two offenses for two separate mailings involving the same letter.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner Joyce was convicted on seven counts (Counts 1, 8-11, 13, 15) and petitioner Wallace on one count (Count 5) of a 15 count indictment charging them with mail fraud in violation of 18 U.S.C. 1341.[1]

The evidence showed that petitioners, and co-defendants Sherre and Ostrander,[2] devised a scheme to defraud firms engaged in the business of placing insurance risks, certain state departments of insurance, and persons who were induced to purchase insurance policies from Global Surplus and Excess Limited ("Global") (Joyce Pet. App. 19-21). According to the proof in support of the allegations contained in Count 1, petitioners and their codefendants caused Global to enter into an Illinois land trust with the Cosmopolitan National Bank of Chicago. They represented that the trust was established to protect the United States and Canadian policy holders of Global. They thereupon conveyed certain Illinois real estate into the trust and represented that it was an asset of Global, and had the Cosmopolitan National Bank circulate copies of the

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[1]Prior to trial, on motion of the government, the district court dismissed Count 2 as to all defendants and Count 15 as to petitioner Wallace. Petitioner Joyce was found guilty on all 14 remaining counts, and petitioner Wallace on Counts 5, 6 and 8. The district court granted petitioner Joyce's post-trial motions for acquittal as to Counts 3 through 7 and 12 and 14, and petitioner Wallace's motion for acquittal on Counts 6 and 8. Petitioner Joyce was sentenced to a term of imprisonment for one year on Count 1 and fined $1,000 on each of Counts 8-11 and 13; imposition of sentence was suspended on Count 15 and he was placed on probation for 5 years. Petitioner Wallace was sentenced to a term of imprisonment for one year on Count 5. The court of appeals reversed petitioner Joyce's conviction on Count 13.

[2]Ostrander pleaded guilty to Count 14. Sherre was found guilty on Counts 7 through 15. The district court granted Sherre's post-trial motions for acquittal on Counts 7, 8, 12 and 14.

trust agreement to insurance brokers and agents and state insurance agencies to induce them to place and permit placing of insurance risks with Global. They also prepared letters of appraisal for the trust real estate assignment in excess of its value, and had the letters circulated to insurance brokers and agents and state insurance agencies in order to induce them to use and permit use of Global. In addition, they failed to advise that some of the trust real estate was heavily mortgaged. Petitioners and their co-defendants then formed a corporation called Global Surplus and Excess Limited of Illinois, and represented that it was a holding company for the real estate trust. They subsequently made a series of false representations in Global's financial statements, and illegally converted funds deposited in the checking accounts of various banks that had been deposited for the protection of Global policy holders.

Each of the counts on which petitioners were convicted involved a different mailing in violation of 18 U.S.C. 1341.

1. Petitioner Joyce contends that he was denied a speedy trial because of the delay of some 34 months before the indictment was returned. He argues that Rule 48(b), F.R.Crim.P.,[3] requires that where a defendant alleges that he has been denied a speedy trial, the government must prove that there has been no unneces-

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[3]Rule 48(b) reads as follows:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

sary delay, regardless of whether or not the defendant has been prejudiced. He implies that the interpretation given *United States* v. *Marion*, 404 U.S. 307, by the court below (Joyce App. 32-36)[4] would in effect repeal the plain language of Rule 48(b).

a. As the court below correctly noted (Joyce Pet. App. 32-34), however, *Marion* held that both the Sixth Amendment's speedy trial provision and Rule 48(b) are applicable only to post-arrest or post-indictment proceedings, 404 U.S. at 319. Although the due process clause may require dismissal of an indictment if preindictment delay caused substantial prejudice to a defendant's right to a fair trial and was intentionally used, 404 U.S. at 324, petitioner Joyce has proved no intentional delay nor shown any prejudice resulting from the delay. There was therefore no error in the district court's denial of Joyce's motion for dismissal of the indictment for alleged failure of the government to grant him a speedy trial.

b. Petitioner Joyce also contends that he was denied a speedy trial due to post-indictment delays. As the court of appeals noted, however, the time between indictment and trial was only 12 months, the delay being attributable in varying part to the defendants, the government, the district court's docket, and the complexity of the case (Joyce Pet. App. 34-35). Furthermore, petitioner Joyce alleges no specific prejudice. In those circumstances the court below was correct in rejecting this claim (Joyce Pet. App. 35-36). See *Barker* v. *Wingo*, 407 U.S. 514.

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[4]References to documents contained in both petitioners' appendices will be cited to the appendix in No. 73-1947 only.

2. Petitioner Joyce contends that, as to three counts (Counts 1, 8 and 15), the proof was insufficient to show that the relevant documents were actually mailed. He further contends that, as to four counts (Counts 1, 8, 10 and 11), use of the mails bore too tenuous a relation to the scheme to warrant conviction under 18 U.S.C. 1341.

a. The evidence as to Count 1 showed that petitioner Joyce requested the Industrial Valley Bank and Trust Company to send him duplicate statements of Global's account with that bank, and that petitioner Joyce used the information he received from the bank in drawing a $2,359.65 check on the account in payment of an American Express bill—a use inconsistent with the purposes of the trust account. Knowledge of Global's balance in the account was therefore an essential element of the conversion scheme, and the evidence was sufficient for the jury to have found that the mailing occurred.

b. The evidence as to Count 8 showed that petitioner Joyce caused International Excess Agency of Cleveland, Ohio, to mail him a copy of its letter to Carl Brown in St. Louis, Missouri, which enclosed Joyce's false statement of assets so that Brown could secure approval for Global to do business in Missouri. The copy clearly furthered the fraudulent scheme since it was only through receipt of the copy that petitioner Joyce could keep track of "who had been told what in the scheme of misrepresentations" (Joyce Pet. App. 27), and the evidence was sufficient for the jury to find that the mailing occurred.

c. Counts 10 and 11 concerned a broker's inquiry addressed to the Cosmopolitan National Bank asking for the status of Trust No. 15385, the real estate trust established by Global (Count 10), and a letter from the assistant vice president of the bank to Global, stating that the inquiry should receive immediate attention (Count 11) (Joyce Pet. App. 29). Since the defendants were inducing insurance brokers to rely on the trust, the fraudulent scheme depended upon the Cosmopolitan Bank forwarding to the defendants all correspondence concerning the trust so that the defendants could continue their misrepresentations without the bank divulging the trust's real value. The jury was therefore entitled to consider these letters as furthering the scheme.[5]

d. The evidence as to Count 15 showed that petitioner Joyce caused a letter to be sent to E. P. Littlejohn & Son in Marshall, Texas, which expressed concern that a copy of a letter from an unpaid claimant had been forwarded to Cosmopolitan National Bank. Since the defendants did not want the bank to correspond with brokers and thereby divulge the true value of the trust, this letter furthered the fraudulent scheme.

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[5]In contrast to *United States* v. *Maze*, 414 U.S. 395, relied upon by petitioner Joyce, the scheme here was to earn profits by persuading people to place insurance with the undercapitalized company. Therefore, any letter which was incident to the running of Global and which tended to give the impression that all was well, that risks were adequately protected, and that business was being transacted normally, was in furtherance of the scheme under prior decisions of this Court approved in *Maze*. While inquiries to Cosmopolitan were aimed at detecting any fraud which might xist, it was necessary to permit such inquiries to persuade some victims that the trust was as represented. Defendants were found to have arranged favorable replies to such inquiries, so that these mailings were also in furtherance of the scheme. *Maze* does not affect the foregoing analysis of the mailings involved in this appeal.

3. Petitioner Joyce contends that the failure of the government to call the writer of the letter in Count 8 as a witness deprived him of his right to cross-examination. We note initially that because petitioner Joyce did not raise this issue in the court of appeals, it should not be considered by this Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2, citing *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. In any event, the claim is without merit. Although the writer of this letter was not called by the government, the writer's superior at International Excess Agency testified as to the business practice of the company, and this was enough to show that the letter had been mailed. If petitioner Joyce wanted to examine the writer of the letter nothing prevented him from calling the writer as his own witness.

4. Petitioner Joyce finally contends that it was error to convict him on two separate offenses involving the same letter which had been twice sent through the mails, first as an inquiry to the Cosmopolitan National Bank (Count 10), and then by the bank to Global (Count 11). The second time the letter was placed in the mail, however, it was accompanied by a letter from the bank's vice president, stating that the inquiry should receive immediate attention. As has already been stated, the scheme depended upon the bank forwarding to the defendants all correspondence so that the defendants could continue their misrepresentations. Each use of the mail—the original inquiry to the bank, and the forwarding of the inquiry to the defendants—therefore furthered the scheme.

5. Petitioner Wallace contends that the evidence was insufficient to support his conviction on Count 5 (Wallace Pet. 9-16). As petitioner Wallace specifically states, however, he does not challenge the sufficiency of the proof of the underlying scheme (Wallace Pet. 5). Defendants were charged in Count 5 with the December 21, 1966 mailing of a letter to International Excess Agency in Cleveland, Ohio. The letter stated that Wallace, Joyce, and Ostrander had agreed that some of the cost of Sherre's legal services should come from Global funds held by Paterson's office. Paterson refused the request because the Ohio Department of Insurance had asked him to keep all of Global's funds in escrow. As the court of appeals correctly held, "[w]ith Wallace's and Joyce's consent, Sherre was attempting to obtain for himself funds that were segregated for the benefit of policyholders' claims in Ohio. The letter thus falls within the conversion scheme alleged" (Joyce Pet. App. 25-26). The court further stated (Joyce Pet. App. 26):

> At the time this letter was sent, Wallace was still active in Global's affairs. As a member of a mail fraud scheme, Wallace was responsible for any letter which any other member of the scheme caused to be mailed in execution of the scheme. *Pritchard* v. *United States*, 386 F. 2d 760, 764 (8th Cir. 1967), certiorari denied *sub nom. Borchelt* v. *United States*, 390 U.S. 1004; * * *.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

JANUARY TERM, 1974

THOMAS E. JOYCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

JANUARY TERM, 1974

NO.

THOMAS E. JOYCE,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO: *The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.*

Petitioner, Thomas E. Joyce, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit insofar as said opinion affirmed his conviction and sentence.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit in *United States of America* v. *Thomas E. Joyce, et al.*, Nos. 73-1014, 73-1015, 73-1016 was entered on May 9, 1974, but is not yet officially reported. It is printed in the Appendix to this Petition. (App. 18)[1] The Opinions of the Trial Court are not yet officially reported, but are printed in the Appendix to this Petition. (App. 1-17)

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was filed on May 9, 1974. (App. 18) A timely Petition for Rehearing was denied on May 28, 1974. (App. 47) This petition is filed within thirty days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does this Court's decision in *United States* v. *Marion*, 404 U.S. 307, create a rule that the unnecessary delay provisions of Rule 48(b) of the Federal Rules of Criminal Procedure impose upon the defendant the onus of demonstrating the delay was unnecessary and that specific prejudice followed therefrom?

2. What is the standard of proof required to support federal jurisdiction under the Mail Fraud statute? Specifically, will an inference that a letter was sent from outside the venue area to an address shown support a second inference it was received at that address, as charged

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[1] "App. ...." denotes Appendix to the Petition.

(Count 1), especially when venue relies on that inference piled on inference? Is it sufficient that a letter recites a carbon copy was to go to a named individual, without an address (Count 8) to support an inference it was mailed, and received by mail at Petitioner's residence address in the vicinage as charged in the indictment? Does testimony that a letter was "in all probability mailed" (Count 15) satisfy proof beyond reasonable doubt?

3. Does the recognition by the whole panel that the nexus between the Count letters on Counts 1 and 8 and the scheme can only be attained by tortuous reasoning on the Government's part, contradict the Supreme Court's delimitation of the application of the mail fraud statute that it be used only in "those limited instances in which the use of the mails is a part of the execution of the scheme to defraud"? *Kann* v. *United States,* 323 U.S. 88 at 95.

4. Whether the proof on Count I, wherein the count letter's nexus to the alleged scheme—that Joyce would anticipate he would be notified of a dollar's monthly charge for a duplicate bank statement and the drawing of a $2,300.00 check on the bank thereafter to American Express—which rationale was formulated after trial by the Trial Judge, never considered nor noticed by the Petitioner nor the Government during the trial, never argued by either party, deprives the Petitioner of due process of law.

5. When a person, not a co-conspirator, recites a consent or agency in the Count letter (Count 8) and neither that person nor any one else having knowledge of the making of the document testifies, has the Petitioner been deprived of his right of cross-examination?

6. Can the sending by an alleged victim of a letter to verify the representations (Counts 10 and 11) be considered a furtherance of a scheme to defraud? Did this letter not "increase the probability that the respondent would be detected and apprehended," (*United States* v. *Maze*, 94 S.Ct. 645)?

7. Whether the same letter (Counts 10 and 11) can be the basis of two mail fraud convictions sustaining separate punishment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment—Constitution of the United States

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment—Constitution of the United States

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18, United States Code, Section 1341

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the decision thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j) (11), 84 Stat. 778.

STATEMENT OF THE CASE.

This case originated by the filing of an indictment in fifteen counts on May 27, 1971, (Doc. 2) [2] charging in each said count a violation of Title 18, U.S.C. §1341, commonly known as the mail fraud statute.

In Count One thereof the alleged scheme is set forth, naming this Petitioner and three co-defendants, one Burton Sherre, Harry Wallace, and Robert L. Ostrander as co-defendants in each of said counts.

Ostrander pleaded guilty to Count XIV (a count later dismissed as to all other defendants). All other counts were dismissed as to him.

The scheme, in effect, charges that the victims were persons engaged in the business of placing insurance risks, "insurance brokers and agents", including Bert N. Carvalho, Jr.; Thomas H. Paterson; E. Price Littlejohn; Carvalho and Company, Inc.; E. P. Littlejohn & Co.; International Excess Agency, Inc.; Fred Pearson; and Aviation and Reinsurance Corporation of America. Also numbered among the "victims" are certain state insurance agencies, and purchasers.

The scheme and artifice to defraud is alleged as constituting the formation of Global Surplus and Excess Limited, a Bahaman Company, having the purpose of carrying on an insurance business; that a part of the scheme involved the entering into a trust agreement between Global and the Cosmopolitan National Bank of Chicago under Trust Number 15385, which it is alleged the defendants represented was established for the protection and benefit of those insured by Global; that, con-

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[2] "Doc." and "A" refer to the Trial Court record. "App." refers to the Appendix attached to this Petition.

tinuing the alleged scheme, a power of attorney agreement was entered into by the defendants appointing Burton Sherre, as Attorney in Fact for the above Trust, giving Sherre power of direction over said trust to act for and on behalf of those insured by Global; that the defendants conveyed into the Trust certain real estate, which they represented to be assets of Global, for the protection and benefit of those so insured; that, furthering the scheme, copies of the Trust Agreement were generally circulated to induce the placement of insurance by agents and State Insurance Agencies for the purpose of inducing said agencies to permit "insurance brokers and agents" to place insurance risks with Global; that, further, the scheme is alleged to have included the preparation of letters of appraisal of such real estate with an assigned value in excess of the true value, with a circulation of such letters of approval to the agents and brokers and to the State Insurance Agencies to induce, and to permit the placing of the insurance risks with Global; that as part of the scheme and artifice, it is alleged that the defendants omitted to advise the brokers, agents, and State Insurance Agencies that some of the real estate conveyed into the Trust was mortgaged "in amounts equal to or in excess of the true value of the real estate"; that, further, Global was caused by the defendants to be incorporated in Illinois; that Global was represented as a holding company for the real estate in Trust Number 15385, and a final representation that Global Surplus and Excess Limited of Illinois was a wholly owned subsidiary of Global Surplus and Excess Limited; that the defendants circulated balance sheets and financial statements relative to the financial condition of Global which were false and that they represented that funds deposited at various banks would be for the protec-

tion and benefit of policyholders and assureds of Global, which the defendants would and did convert to their own use.

On July 30, 1971, this petitioner moved to dismiss the indictment on the grounds of delay in prosecution, and prejudice to him occasioned by such delay, including the death of witnesses since July, 1968, before which July 1968 Grand Jury this petitioner was subpoenaed for presentation of corporate documents. Other motions including a motion for severance from the co-defendant Wallace were also submitted.

On March 6, 1972, all defendants, including this petitioner, moved again to dismiss for want of speedy trial (Doc. 28-29), which motion was also denied.

The cause was brought on for trial on June 15, 1972, and continued from day to day thereafter until June 30, 1972. Except for Count Two (dismissed by the Government) and Count Fourteen (dismissed by the Court at the conclusion of all the evidence), this petitioner was found guilty on all counts.

As the defense was about to begin, this petitioner became seriously ill requiring hospitalization. He did not attend for the defense, argument, instructions, nor verdict. Because of his illness, he asked for, and secured, additional time to file post-trial motions. Some confusion ensued, and his Notice of Appeal was filed before the trial judge had opportunity to rule upon them. The Court of Appeals allowed a limited remand to afford that opportunity. On the limited remand, petitioner was granted acquittal on Counts 3 through 7 and 12 and 14, generally on the basis of failure of proof of mail use as charged. Thereafter, petitioner's co-defendants requested remand to secure the

advantage of that trial court determination, which they received—plus a finding and acquittal by the trial judge that mailing had not been proved on Count 8. This petitioner sought the same ruling on his conviction on Count 8, which the trial judge declined on the basis that the limited remand order had been executed, and jurisdiction over petitioner had re-vested in the Court of Appeals.

On review the Court of Appeals affirmed Count 1 (all judges critical of the extent to which the prosecution had extended the mail fraud statute); Count 8 (one judge dissenting, and the affirming judges extending the same criticism as made to Count 1); Count 9; Counts 10 and 11 (all judges critical of the multiplication of punishment on the basis of a remailing of the same Count letter); and Count 15. Conviction on Count 13 was reversed.

STATEMENT OF FACTS

The proof of the scheme charged will not be extended. This petitioner concedes that the No. 2 representation in the Global financial statement (App. 20) was probably an overstatement of value, and that the account at the Industrial Valley Bank and Trust Company (see Count I *infra*) was used for expenses as well as being maintained as a loss reserve for policyholders. However, it is appropriate to point out that no claims were unpaid. In fact, defense counsel challenged the Government to present one policyholder that had lost money (Tr. 1474-5) and it did not, and could not.

Count I

The Count relates to an account of Global at the Industrial Valley Bank and Trust Co., Jenkinstown, Pennsylvania (Tr. 556-559). An original communication (G. Ex. 114-B, not a Count letter) was a request of this petitioner that he receive a copy of the bank statement on

the Global account. The Count letter (G.Ex. 114-C) is a carbon copy of a document which reads as follows:

"June 9, 1966
Mr. Thomas J[illegible]e
7019 W. Higg[illegible]s Ave.
Chicago, Ill. 60656

RE: Request for Duplicate
Statement
Global Surplus & Excess Ltd.

Dear Mr. Joyce:

Your request will be complied with and you will begin to receive a copy of the statement each month beginning with the May statement until further notice from you. There will be a maintenance fee of $1.00 per month for this service.

I am very happy to be of service in this matter. We appreciate your business and are always available to you with our full and many banking services.

Sincerely yours,

W. Kenneth Clark"

The Court witness-signatory testified that in the ordinary course of business the letter would have been put in the mail in Pennsylvania. There was no other witness, and, accordingly, no proof of receipt.

On motion for judgment of acquittal after trial, the Court ruled:

"The Count I letter (Ex. 114-C) is from an official of a bank, which held an account for Global, advising Joyce that the bank would honor his request for copies of the monthly statements. The government argues that the jury could have found that the mailing of the count letter was in furtherance of the scheme of Joyce and the other defendants to with-

draw and convert funds from the account even though they had represented that it was to be held as a reserve to pay losses. Although the copies of checks drawn on the account (Ex. 116) are almost entirely illegible, the Court has found one such check drawn on the account by Joyce to the American Express Company subsequent to the date of the Count I letter. A reasonable mind could thus have fairly found beyond a reasonable doubt that the count letter was incident to an essential element of the conversion scheme—knowledge of the balance in the account." (Memorandum Opinion and Order of June 1, App. 13-14.)

No questions were asked about the American Express check on trial, neither of its making, its purpose, the beneficiary or whatever it paid for. Neither was its value as evidence argued, nor in fact noticed, by either side.

The Court of Appeals upheld the mailing, petitioner's causing the mailing, and furtherance of the scheme through the letter as follows:

"As to the proof of mailing of this count letter, witness Clark testified that he dictated the letter and that his secretary's practice was to send out all dictated letters (other than interoffice correspondence) by mail. Testimony as to office practice is sufficient proof of mailing.

* * *

"... [t]he letter was more than a mere acknowledgment; it also informed Joyce that there would be a $1 per month fee for the service he requested. It was foreseeable that there would be a charge, and that the bank would not impose the charge without an explanation. Joyce could thus foresee that his request would cause the mailing of a letter advising him of the fee, and this is sufficient.

* * *

"The Government has argued that the letter furthered the scheme because it was essential for Joyce to keep track of the balance in the account so that he and other defendants could withdraw funds from the account for their own use, although they represented that it was to be a reserve to pay losses. Since the district court found that Joyce had drawn a $2,359.65 check on the account payable to American Express, it concluded that 'a reasonable mind could thus have fairly found beyond a reasonable doubt that the count letter was incident to an essential element of the conversion scheme—knowledge of the balance in the account.' We agree that the trier of fact could have drawn the inference that the American Express check was not drawn to pay a policyholder's claim." (App. 24, 23)

The Chief Judge, while not dissenting on this Count, expressed his disapproval, in which the other members of the panel joined:

"In my opinion, the Government has stretched to the breaking point the mail fraud statute by using as the count letter in Count 1 the acknowledgment from W. Kenneth Clark of the Industrial Valley Bank and Trust Company, Philadelphia, of Joyce's request for a monthly bank statement of the Global account. The acknowledgment letter was only tangentially related to the fraudulent scheme. I believe the intent of the statute would be better served by using mailings that have something more than a strained relation to the scheme, and not a miscellaneous, random piece of correspondence that requires tortuous reasoning on the Government's part to sustain the conviction." (App. 46)

Count VIII

The Count 8 letter is a covering letter by one Robert D. Meyers to one Carl Brown purporting to forward a Global

financial statement from Cleveland, Ohio to St. Louis, Missouri. Thus, in pertinent part, it reads: "With the consent of Mr. Thomas Joyce we are enclosing the only copy we have of Global's statement. . . . Hoping this will be of value to you in getting Global approved in your state." The face of the letter noted "cc: Mr. Thomas Joyce." (Government Exhibit 29) The evidence of "mailing" is non-existent.

> "A. (Paterson) . . . I then turned over the document referred to to Mr. Meyers and told him to send it out.
> "Q. Did you tell him how to send it?
>
> * * *
>
> "Q. Did you tell Mr. Meyers how to send that document?
> "A. I don't believe I did.
>
> * * *
>
> "Q. Was there a usual procedure that he would follow if you told him to send that letter?
> "A. Yes.
> "Q. What would that usual procedure be?
>
> * * *
>
> "The Witness: He would put it on the mail table and the girl would put it in an envelope and stamp it and send it out." (Tr. 845-7)

But even this paltry evidence is later completely undermined. Paterson did not turn the document over to Meyers because he didn't compose the letter; didn't even know if he was in Cleveland on the day of the letter (Tr. 967).

On remand granted on this case, this defendant asked the Count be dismissed for failure of proof of mailing and venue. The motion as to this Count was denied (Supp. C.L. Doc. 12 and 20).

Later, the co-defendants secured a remand and prayed the same relief. It was granted, the Court holding in pertinent part:

> "Count 8 alleges that defendants caused a letter to be mailed from Cleveland, Ohio, to defendant Joyce in this district. No such letter was ever offered in evidence. Instead, the government merely proved the mailing of a letter from Cleveland to St. Louis, Missouri, which bore the notation "cc: Mr. Thomas Joyce." This is not a sufficient basis for a reasonable inference that a copy was mailed to Joyce. Without such an inference, a reasonable mind could not fairly conclude that the evidence showed the essential element of mailing beyond a reasonable doubt." (Supp. C.L. 31)

The co-defendants were acquitted on the Eighth Count on the basis of their post-trial motion, on the reasoning and conclusion of the Court as set forth above. This defendant asked for equal consideration, since mailing proof having failed as to them, it must also fail as to him. The trial court determined that it had already acted on the limited remand as to Mr. Joyce, and that it was, thus, unable to grant the relief because of loss of jurisdiction.

The majority of the Court of Appeals panel, however, found proof of mailing:

> "The trial court granted Sherre's and Wallace's post-trial motions for acquittal on count 8, stating; "the government merely proved the mailing of a letter from Cleveland to St. Louis, Missouri, which bore the notation 'cc: Mr. Thomas Joyce.' This is not a sufficient basis for a reasonable inference that a copy was mailed to Joyce. We disagree, for the witness Paterson testified that the notation meant a carbon copy was directed to Joyce, and that the customary procedure was to place such a copy in a separate pile

of mail going to Joyce or Global, and then to mail the pile in one envelope. That was sufficient." (App. 27-28)

The dissent, however, would have upheld the Trial Court's evaluation:

> "The Government unsuccessfully attempted to establish proof of mailing through the testimony of Tom Paterson who directed a subordinate to draft the letter and enclose a financial statement of Global. While Paterson testified to the customary procedures for mailing letters and copies in his office, it is significant that he did not personally prepare the letter and that he did not know whether he was in his office on the date shown on the letter. In this posture, Paterson could not say that a copy of the letter was ever mailed or received by Joyce in Chicago. No other testimony was offered by the Government to establish proof of mailing. The notation in the count letter "cc: Mr. Thomas Joyce" standing by itself is an insufficient basis from which to conclude that a copy was mailed to Joyce. Accordingly, the conclusion is inevitable that even when the evidence is viewed in a light most favorable to the Government, the record will not support a reasonable inference that a copy of the letter was sent to Joyce." (App. 44)

The dissenting judge also found unfairness in finding this petitioner guilty where all co-defendants were acquitted.

Counts X and XI

Count X concerned an inquiry made of the Cosmopolitan National Bank as to the condition of the trust established by Global. Count XI is the forwarding of that letter by Cosmopolitan to Global. Though both Counts were affirmed, the dissenting Judge spoke critically of this multiplication of Counts:

"The foregoing observation [of stretching the mail fraud statute to the breaking point] is equally applicable to Counts 10 and 11 where the count letter in Count 10 becomes the underlying basis for Count 11 since the latter count dealt with merely a forwarding of a photostatic copy of the Count 10 letter from the original addressee, Cosmopolitan National Bank, to Global. If the copy of the original letter had been forwarded several times through the mail, presumably the Government would have been able to indict for each separate mailing. It seems to me the prosecutor has a responsibility to exercise restraint and should not approve indictments on essentially irrelevant or duplicative mailings in order to increase the number of counts." (App. 46)

The majority agreed with the observation. (App. 41-42)

Count XV

The only facts necessary for consideration of this Count is the proof of mailing:

"Q. I will show you what has been marked as Government's Exhibit 73 in evidence. This is a letter I believe there has been testimony sent by you to Mr. Littlejohn.

"A. That is my signature, sir. I presume if Mr. Littlejohn produced it to you, that I in all probability mailed it.

"Q. You in all probability mailed it?

"A. I in all probability mailed it to him, yes, sir.

"Q. On February 28, 1968 did you hand-deliver it to Mr. Littlejohn?

"A. No, I did not, sir." (Tr. 1523).

REASONS FOR GRANTING THE WRIT

This Court should issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this case on the following grounds:

1. Rule 48(b) speaks of unnecessary delay in presenting a case to a grand jury or in bringing a defendant to trial authorizing dismissal of the indictment. The Court of Appeals for the Seventh Circuit has ruled in this case that this Court's decision in the *Marion* case *(United States* v. *Marion,* 404 U.S. 307) "clearly implies that the limitations period is the only protection against delay [before indictment] unless specific prejudice is shown [by the defendant]." This imposition of the burden of demonstrating prejudice upon the defendant though the clear reading of the Rule [48(b)] puts the burden on the government to demonstrate the delay was necessary. This important question where the defendant is obliged to make a showing of intentional delay plus demonstrative prejudice would nullify the apparent intent of the Rule. The question of whether *Marion* was intended to modify the Rule is a question which has not been, but should be, decided by this Court.

2. This case presents a unique question of federal law that has never been—but should be—ruled upon by this Court, which is whether the venue allegations of an indictment (Counts 1 and 8) and the Sixth Amendment declaration that trials be had within the vicinage where the charged crime occurred can be satisfied by a presumption of fact that a letter inferredly mailed has inferredly been

received, which is without support in the law nor declared by Act of Congress. It presents a correlative question of whether the jurisdiction element of mailing can rest exclusively on a probability.

3. The Court of Appeals unanimously recognized that the Count I mailing—the only Count upon which a jail sentence was imposed—"was only tangentially related to the fraudulent scheme," having but a "strained relation" to it devised by "tortuous reasoning on the government's part to sustain the conviction." Affirmance of conviction with such understanding of the evidence is in conflict with decisions of this Court, as well as all other courts, which recognizes the purpose of the Mail Fraud Statute (18 U.S.C. §1341) is to protect against the use of the mails, "for the purpose of executing" the scheme.

4. It is a fundamental of civil law that a cause tried on one theory cannot be affirmed on another. *Hormel* v. *Helvering*, 312 U.S. 552, 556. Clearly no less can be required in a criminal trial where liberty is in the balance. This Court's supervisory power is appropriate in this case where the theory on which conviction rests was not considered until after trial, the jury excused, and the opportunity to defend gone.

5. The decision on Count 8 goes beyond the theory of vicarious liability among co-defendants, which allows the imputation of agency—as in conspiracy—to redound to the detriment of the parties to the unlawful enterprise. Here an independent party's representation of an agency in a document (which statement was never qualified nor explained nor was the author called on as a witness) is the basis for the sustaining of the essential element of causing to be mailed in furtherance of the scheme. Prolix indictments, with multiple counts have become a dragnet

which do not allow the triers of fact and triers of law neither time nor capacity for individual consideration.

6. The Counts 10 and 11 letters are actually one inquiry to validate or invalidate the alleged false representations made to an alleged victim. The inquiry increased the probability that the scheme would be detected and the perpetrator apprehended. Calling this a letter in furtherance of the scheme is in direct conflict with this Court's decision in *United States* v. *Maze*, 94 S. Ct. 645.

7. The mere forwarding of a count letter (Count X and XI) is a multiplication of offenses based on one transaction. The fact of separate punishment on each count demonstrates a piercing violation of the double jeopardy clause.

The aforestated Reasons for Granting the Writ are more factually expanded hereinbelow.

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1. On July 2, 1968, this petitioner was called before the July 1968 Grand Jury to testify about the matters here in issue. (Tr. 23-24) It was obvious then that the company with which he was associated was being investigated and that he was a target and potential defendant. However, that July 1968 Grand Jury was dismissed in December of that year without the return of an indictment. It was not until May 27, 1971, a matter of thirty-four (34) months later, that this indictment was returned, all charges relative to the matters that were investigated almost three years before for Grand Jury presentation with this petitioner's awareness of that Grand Jury investigation. On July 30, 1971, this petitioner moved to dismiss the indictment for want of a speedy trial as being violative of, not only the Sixth Amendment to the Constitution of the United States, but also Rule 48(b) of the Federal Rules of Criminal Procedure.

Excusing this delay, the Court of Appeals held:

> "The only specific complaint is that two witnesses died. The first, a Mr. Black, would allegedly testify that he filed Global's financial statement with the Pennsylvania Insurance Department, even though Joyce told him not to file it because it was erroneous. Since Global did business in Pennsylvania, defendants had to know that papers had been filed with the Pennsylvania Insurance Department, and they could have shown any attempts to correct Black's misstatements by cross-examining the witness from the Department." (App. 33-34)

The Court continued:

> "Nor is there any showing of intentional delay by the Government. The voluminous transcript and exhibits show that this scheme was a complex one that must have required a lengthy investigation." (App. 34)

We submit to the Court that a voluminous transcript and exhibits do not necessarily impute a necessity to attenuate. Watergate [3] is complex and voluminous and many defendants are already disposed of. A voluminous record does not necessarily import a complex case, and this was *not* a complex case.

We submit to the Court that it should not be enough for the government to satisfy the prohibition of Rule 48(b) to imply it had a complicated scheme, for a burden to devolve on the defendant to show not only an intentional delay by the Government (a burden no defendant can successfully demonstrate) plus a demonstrable, and irrefutable showing of personal prejudice.

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[3] We do not intend to launch into a Watergate discussion neither pro nor con. We use the demonstration only because of its wide publicity and the general public knowledge.

If this decision of the Seventh Circuit is allowed to stand, Rule 8(b) is successfully annulled.

A summary of the facts indicative of the government's conduct follows:

(a) Subpoenaing petitioner before the July, 1968 Grand Jury, wherein he appeared, produced records and testified;

(b) Dimissal of said July, 1968 Grand Jury in December, 1968 without return of an indictment.

(c) Lapse of about 23 months without any action by the government, and a lapse of about 30 months since dismissal of the 1968, Grand Jury, until the return of this indictment on May 27, 1971.

Said conduct is further exemplified by the actions of the government after the indictment:

(a) The government did not file its answer to petitioner's original motions until on or about November 22, 1971, even though it had been ordered to make such answer by August 10, 1971, without asking the court or defendants for an extension of time to answer.

(b) On November 19, 1971 with all parties present the court (Judge Marovitz) set the case definitely for trial for Monday, January 31, 1972, (Tr. Nov. 19, 1971, p. 7) further reiterated that said cause would go to trial on said January 31 (Tr. Nov. 19, 1971, p. 10), and would not be continued (Tr. Nov. 19, 1971, p. 11).

(c) On December 21, 1971, Judge Marovitz reminded the parties that the case would go to trial on January 31 (Tr. Dec. 21, 1971, pp. 3 and 15), after being advised that defendants wanted an expeditious trial.

(d) On January 12, 1972, Judge Marovitz upon motion made by the government to reset the trial date, and set the trial for March, 1972 (Tr. Jan. 12, 1972, p. 4), after being advised by this petitioner that he did

not need or want a continuance (Tr. Jan. 12, 1972, pp. 3 and 7)

(e) The government attorney was ordered by the court to contact the defendants to discuss the matter regarding stipulations, after being advised that the government failed to do so before (Tr. Jan. 12, 1972, pp. 4, 6, 7 and 8) and the matter was set down for status report for February 4, 1972.

At which time the following colloquy occurred:

"The Court: * * * We have a problem with you, not with them. They have come in. They are ready. There are two lawyers. Are you a lawyer, Mr. Joyce?

"Mr. Joyce: I am a lawyer, Judge, and I have tried many cases and I can act as my own lawyer if I have to and I am ready.

"The Court: Is Mr. Sherre a lawyer?

"Mr. Joyce: Yes, he is, too.

"The Court: And who represents Sherre?

• • •

"Mr. Joyce: Mr. Murtaugh has filed his appearance. He is ready to try it. He told me that yesterday. I have talked to Mr. Echeles and the chances are Mr. Echeles will represent me, and Murtaugh will represent Sherre. But at any rate we are not asking for any continuance and never have in this case. This matter came up for three years previously before the Grand Jury and I had the same problem with the Postal Inspectors, continuances and continuances.

"The Court: These men are members of the bar and they are entitled to have an early trial, and if this case is not tried, I will do something about it on March 6th. And in the interim, and don't wait until March 5th to contact them." (Tr. Jan. 12, 1972, p. 4-6)

(f) On February 4, 1972, Judge McLaren was advised that the government made no attempt to contact defendants concerning these stipulations (Tr. Feb. 4, 1972, pp. 2 and 4); further, defendant advised the

court that he was ready for trial (Tr. Feb. 4, 1972, p. 3). Accordingly, it was stated by the court that the matter is slated for trial in March (Tr. Feb. 4, 1972, p. 5). (See order of court.)

(g) On March 8, 1972, Judge McLaren was advised that defendants were ready for trial (Tr. March 6, 1972, p. 3); that then the clerk of the court advised the court that Assistant U.S. Atty. Lydon called him (the clerk) and said this case would be set over sometime in May, and that he (Mr. Lydon) would notify all parties (Tr. March 6, 1972, p. 3); but that neither Mr. Lydon nor anyone from the government notified the defendants that the case would be continued.

2. In neither of these counts, 1 and 8, was there any proof adduced as to receipt, though both counts alleged the receipt by this petitioner of the count letters. It is on the allegation of receipt of the mail that venue rested. It is on the allegation of receipt of the mail that the Sixth Amendment assurance of trial within the vicinage of the crime charged was to be had.

The Count One letter was a file copy of the bank's communication addressed to this petitioner at 7019 West Higgins Avenue, Chicago, Illinois. The witness testified that he dictated the letter and that his secretary's practice was to send out all dictated letters by mail. Of course that letter was mailed in Marion, Pennsylvania. Only proof of the receipt could have satisfied the allegations of the indictment and the Sixth Amendment requirement relative to vicinage. To satisfy this proof and venue objection, the Court of Appeals for the Seventh Circuit opined "In the normal course of the mails, we presume that a letter is sent to the address shown, so that venue is adequately established." (App. 25) In support of this statement the Court of Appeals relies upon two civil cases of this Court, which did not have the constitutional element involved, but rather

related to the efficacy of notice. We know of no criminal case where the fact presumption above quoted has ever been accorded validity. In every case recited by the Court of Appeals in support of its decision, there has been proof of receipt, albeit, at times, by custom. Here there was no such proof. Count One goes beyond what has now been determined the nadir of sufficiency to sustain the allegations of the indictment, much less the constitutional mandate of the Sixth Amendment that a defendant shall be tried within the "state and district wherein the crime shall have been committed. . . ."

Even more attenuated is the alleged proof of mailing as to Count Eight. As the main opinion states, "The Government concedes that the proof of mailing as to Count Eight is 'possibly the most circumstantial' ". (App. 27) This concerned a letter to one Carl Brown in St. Louis from one Robert B. Meyers of Cleveland, Ohio (neither Brown nor Meyers are alleged as co-conspirators, nor are they co-defendants). This carbon copy from the files of the addressor had a notation at the bottom "cc: Mr. Thomas Joyce." The indictment charged that Joyce had received this at his home address on the South Side of Chicago. One Paterson testified that "the customary procedure was to place such a copy in a separate pile of mail going to Joyce or Globe [Insurance Company] and then to mail the pile in one envelope." Again there was no proof of receipt, and the fact presumption of the Court of Appeals that "a letter is sent to the address shown" doesn't even obtain here, for no address was shown for Joyce. Nor were Global's offices in Joyce's home. Extending the fact presumption detailed in Count One, the Court of Appeals' main opinion determined that "Since the copy was sent to Joyce in Chicago, venue is present." (App. 28) The dissenting Judge could not tolerate this determination finding that

"[The] record will not support a reasonable inference that a copy of the letter was sent to Joyce", and concluding that "The record is barren of any evidence to establish that Joyce ever received a copy of the letter in Chicago", the dissenting Judge could not agree that either mailing or venue is established. (App. 44, 45)

The Trial Judge also could not see that mailing was established, and he acquitted the co-defendants Sheree and Wallace on account of no proof of the use of the mails in regard to that count letter.

Joyce at that time also asked for the same consideration, but the Trial Judge found that the purpose or time of the remand for consideration of post-trial motions as to Joyce had passed, and that he was without jurisdiction to grant the relief. On this point, the dissenting Judge makes a simple but poignant observation:

> "This recitation of facts clearly demonstrates the unfairness to this defendant through an affirmance of Count Eight." (App. 45)

Whatever the permissible limits of viewing evidence in the light most favorable to the Government on appeal, those limits do not tolerate any consideration that a defendant has been treated unfairly, and when that consideration exists, his conviction should not be allowed to stand. We would suggest that it was this abiding conviction that compelled the dissenting Judge to vote for rehearing, on which he was overruled. (App. 47)

As for Count 15, petitioner's co-defendant testified he "in all probability" mailed the Count letter and that he did not hand-deliver it. Clearly showing no personal recollection, and testifying to no usage or course of business, it would seem clear that jurisdictional bases should not be so

casually accepted where they are based clearly on speculation, guess and surmise.

3. In *Kann* v. *United States,* 323 U.S. 88, this Court stated the rule that,

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." (323 U.S. at 95)

It had occasion to reenunciate the rule in *Parr* v. *United States,* 363 U.S. 370, 389.

Though the mailings in the former case were excepted from the effect of the statute because the scheme had been perpetrated beforehand, and in the later because local law required the mailings, yet the purpose of the statute is as effectively diminished here where the letter's furtherance of the scheme can only be reached by tortuous reasoning and strained, tangential relationship. This reduces the mailings under the statute (18 U.S.C. §1341) solely to create a basis for federal jurisdiction (as under 15 U.S.C. §77q) instead of a fundamental element of the crime described. See the cogent distinction between the purposes of the two statutes in the Second Circuit decision in *United States* v. *Cashin,* 281 F. 2d 669, 674.

4. The weakness of the Government's proof under Count I has already been discussed under the evidence and in the next preceding section hereof. However, what does not appear therein is that the basis for the Trial Court denying the motion for judgment of acquittal after verdict, adopted by the United States Court of Appeals for the Seventh Circuit, never became an issue before the post-trial motions, several months after the jury had been dis-

charged and opportunity to defend against the issue expired. The Court of Appeals decision that the "tangential" connection to the scheme of the letter of the Industrial Valley Bank in reply to petitioner's request for duplicate financial statements was, in essence, that the letter was the forerunner of those statements (though no proof was ever adduced that the statements had ever been sent to petitioner), and that a further element of this tangent was that a check had been drawn on the account to American Express. This theory was never suggested by the Government, never argued to the jury, no questions were asked about the check, of its making, of its delivery, or its purpose. Nothing was done to alert this petitioner or his counsel that it would be the standard upon which his jail sentence would rely. Only after trial, and on motion for judgment of acquittal notwithstanding the verdict, was the theory on which conviction now rests evolved. This type of procedure has been condemned by this Court in civil action.

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. And the basic reasons which support this general principle applicable to trial courts make it equally desirable that parties should have an opportunity to offer evidence on the general issues involved in the less formal

proceedings before administrative agencies entrusted with the responsibility of fact finding." *Hormel* v. *Helvering,* 312 U.S. 552, 556.

To the same effect see *Wagner* v. *Retail Credit Co.,* 7 Cir., 338 F. 2d 598, 601; *Schenfeld* v. *Norton Company,* 10 Cir., 391 F. 2d 420, 424; and *In Re Black Ranches, Inc.,* 8 Cir., 362 F. 2d 19, 32.

5. Count 8 concerns a letter sent by Robert D. Meyer of International Excess Agency, Inc., Cleveland, Ohio, to Mr. Carl Brown, Royal Excess Underwriters, St. Louis, Missouri. It starts out with a recitation that the letter was being sent "with the consent of Mr. Thomas Joyce". It is on the basis of this representation that it is determined that Mr. Thomas Joyce had caused the mailing of the letter. Neither Mr. Meyers nor Mr. Brown was indicted, nor named as an unindicted co-conspirator. Neither Mr. Meyers nor Mr. Brown were called as witnesses. Mr. Meyers' superior, one Mr. Paterson, was the only witness. The majority opinion stated:

"This, of course, fu[illegible]hered the scheme." (App. 27)

Chief Judge Swygert dissenting, however, was somewhat more perceptive, recognizing that the witness did not write the letter, didn't know if he was in the office when the letter was written, and in fact, knew nothing of the writing of the letter. (App. 44) Yet the recitation of the count letter that it had been sent "with the consent of Mr. Thomas Joyce" is the basis of the causing of the mails to be used. Mr. Meyers was not available for cross examination on his recitation in the letter that the letter was sent with Mr. Joyce's consent. No one was available to determine whether that supposed consent was valid. Clearly this is a deprivation of the Sixth Amendment right of cross examination.

6. The indictment defining the scheme charged that the defendants in this case did cause Trust No. 15385, an Illinois Land Trust, to be entered into between Global and the Cosmopolitan National Bank of Chicago. The Court of Appeals also found that the defendants represented that the Trust was established to protect the United States and Canadian policyholders of Global. The count 10 letter is an inquiry by Carvalho and Company, Inc., which represented itself as a correspondent of the Global Surplus & Excess Ltd. and its largest producer of premiums. Its inquiry was that they "would be very interested in learning what the status is of the trust in caption [Trust No. 15385]." In other words, the author of the letter directed to the land trustee was checking on the alleged representations made to him. It is not suggested that Cosmopolitan was in any manner instructed to—nor would it as a National Bank—misinform as to the provisions of the trust. If the allegations of the indictment are credited, a positive response would disclose wherein those representations were false. Clearly this could not be in execution of the scheme. Thus, the successful completion of the mailings . . . increased the probability that [petitioner] would be detected and apprehended." (*United States* v. *Maze*, 94 S.Ct. 645, 650). The letter here is obviously not in furtherance of the scheme and the determination that it is is contrary to this Court's said opinion.

Some recognition is shown of this in the Court's decision as follows:

> "While inquiries to Cosmopolitan were aimed at detecting any fraud which might exist, it was necessary to permit such inquiries to persuade some victims that the trust was as represented." (App. 32)

The Court's mere statement demonstrates that the mailings are not in furtherance of the fraud.

7. We can do no better than to repeat what the Chief Judge (who however did not dissent from the affirmance of these two counts) said in relation to them reflecting a nagging uneasiness about them:

> "The foregoing observation is equally applicable to Counts 10 and 11 where the count letter in Count 10 becomes the underlying basis for Count 11 since the latter count dealt with merely a forwarding of a photostatic copy of the Count 10 letter from the original addressee, Cosmopolitan National Bank, to Global. If the copy of the original letter had been forwarded several times through the mail, presumably the Government would have been able to indict for each separate mailing. It seems to me the prosecutor has a responsibility to exercise restraint and should not approve indictments on essentially irrelevant or duplicative mailings in order to increase the number of counts." (App. 46)

It is significant that the majority was compelled to agree. (App. 41)

Conclusion

Wherefore, this Petitioner respectfully prays the Court to issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ANNA R. LAVIN
Attorney for Petitioner,
Thomas E. Joyce

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

THOMAS E. JOYCE,

Defendant.

No. 72 CR 567

MEMORANDUM OPINION AND ORDER

On July 5, 1972, defendant Joyce was found guilty by a jury under 18 U.S.C. §1341 of fourteen counts of mail fraud. Joyce's post-trial motions were not ruled upon because of the Court's understanding that they were withdrawn when he filed his appeal. On February 20, 1973, this cause was remanded by the Court of Appeals for the purpose of enabling this Court to rule upon said motions. They have now been briefed and will be granted in part and denied in part, as set forth below.

I.

Motion for Judgment of Acquittal

In passing on this motion, the Court considers whether substantial evidence, taken in the light most favorable to the government, and giving full play to the jury's right to determine credibility, weigh the evidence, and draw justifiable inferences, compels a finding that a reasonable

mind might fairly conclude guilt beyond a reasonable doubt. *United States* v. *Williams,* 311 F.2d 721, 723 (7th Cir.), *cert. denied,* 374 U.S. 812 (1963).

In substance, the indictment charges Joyce and his co-defendants with participating in a scheme to make fraudulent misrepresentations of the financial condition of Global Surplus and Excess Limited of the Bahamas, an insurance company, to insurance brokers and agents, state insurance agencies, and persons and businesses desirous of purchasing insurance. Each of the fifteen counts alleges that defendants caused the United States Post Office Department to deliver an envelope containing a letter for the purpose of executing the aforesaid scheme.[1]

A. *Proof of Mailing*

Defendant Joyce asserts that there was insufficient proof of mailing on several counts.

Count I. Witness Clark testified that he dictated (Tr. 575) the count letter (Exh. 114C) and that the practice of his secretary was to send out all dictation by mail (Tr. 577), but that he had no direct recollection of her picking up the letter for mailing (Tr. 569). In *United States* v. *Shavin,* 287 F.2d 647, 652 (7th Cir. 1961), *cert. denied,* 375 U.S. 944 (1963), it was held that proof of an office custom as to mailing, and evidence that the particular letter had passed through such a customary channel, was sufficient proof of mailing. See also *United States* v. *Silvern,* No. 72-1133 (7th Cir., Feb. 27, 1973); *Stevens* v. *United States,* 306 F.2d 834, 835 (5th Cir. 1962). The Court concludes that under these decisions the proof of mailing of the Count I letter was sufficient. Although more direct proof might have been made through testimony by the

[1] Count II was dismissed as to all defendants at trial.

secretary as Joyce suggests, there is no authority in this circuit for holding that the failure to call her is fatal to proof of mailing and, without such authority, this Court rejects those decisions relying upon such a rule. See *Leasing Associates, Inc.* v. *Slaughter & Son, Inc.*, 450 F.2d 174, 179 (8th Cir. 1971); *United States* v. *Wolfson*, 322 F.Supp. 798, 814 (D.Del. 1971), *aff'd*, 454 F.2d 60 (3d Cir.), *cert. denied*, 406 U.S. 924 (1972).

Count III. Witness Bek testified that the Count III letter (Exh. 2-H-1) was sent to defendant Sherre by mail (Tr. 157). Although she did not explain her office's mailing procedure directly in relation to that letter, Bek explained it very soon thereafter in relation to the Count IX letter. But even viewing the evidence in the light most favorable to the government so that the explanation of the procedure would apply to the Count III letter as well, there is no proof that the Count III letter ever found its way into the customary mailing channel. The proof of mailing was therefore deficient on Count III.

Count IV. Witness Paterson testified that the Count IV letter (Exh. 27-A) "would have been sent out by mail . . . in the normal course of events" (Tr. 838-39); that he "probably put it on the mail table" (Tr. 973); and that he "probably" did not put it through the office postage machine (Tr. 974).

Although Paterson was certain that he had typed the letter (Tr. 973), his equivocal answers fall short of a showing that he put it into the customary channel for mailing. The evidence of mailing was thus deficient as to Count IV.

Count VI. Although witness Bek testified (Tr. 157) as to the nature of the Count VI letter (Exh. 3-C-1), neither she nor any other witness gave any testimony tending to show that it had been mailed. The government's proof was therefore deficient as to Count VI.

Count VIII. Witness Paterson testified that he instructed one of his office employees to "send out" the Count VIII letter (Exh. 29) and that the usual procedure would be for the employee to put the letter on the mail table, after which another employee would place it in an envelope and "stamp it and send it out" (Tr. 845-47). The Court concludes that this was sufficient evidence to show that the count letter was put into the customary mailing channel and that a reasonable mind could therefore find beyond a reasonable doubt that it had been mailed.

Count IX. Witness Bek testified that the Count IX letter (Exh. 3-H) was put in her "outbox going out for the mail" and that the procedure in her office was for the mail to be picked up from the outboxes, run through a postage meter, and taken to the post office (Tr. 161). The evidence of mailing for Count IX thus appears clearly sufficient under *Shavin, supra.*

Count X. Witness Carvahlo testified that the regular procedure in his office was for him or his secretary to take all mail to the post office at the end of the day and that, to his knowledge, that procedure was followed in case of the Count X letter (Exh. 3-F) (Tr. 489-90). This was sufficient proof of mailing.

Count XI. Witness Bek testified that she put the Count XI letter (Exh. 3-F-1) "in the normal course so that it would be mailed with the bank mail" (Tr. 160). Considering this testimony with the explanation of the

office mailing procedure which Bek gave very soon thereafter, the Court concludes that there was sufficient proof of mailing on Count XI.

Count XII. Witness Bek testified that the Count XII letter (Exh. 4) came to her department "through the mail" (Tr. 162). This testimony was received over Joyce's standing objection (Tr. 158-59, 162) that such testimony should be stricken unless she personally received the letter through the mail or had personal knowledge of such receipt. The Court concludes that Bek's opinion, unsupported by any showing of the envelope containing the Count XII letter, any time stamp or other mark on the letter to show that it had been received through the mail, or any testimony as to Bek's personal knowledge of receipt, was not sufficient proof of mailing. *Shavin, supra; United States* v. *Browne,* 225 F.2d 751, 756 (7th Cir. 1955).

Counts XIII and XIV. Witness Pearson testified that the presence of a date stamp on the Count XIII letter (Exh. 134-C), in light of the usual procedure used by his company, indicated that it had been received through the mail. (Tr. 1223-24). Although Pearson also testified that there was a possibility that the letter was hand delivered (Tr. 1257), such a possibility is inherent in any situation where the government seeks to prove mailing by evidence of customary procedures. The evidence of the procedure used in Pearson's office and the presence of the date stamp were sufficient to take the issue of mailing to the jury.

The government now agrees that the proof of mailing of the Count XIV letter (Exh. 134-B) was deficient.

Accordingly, judgment of acquittal n.o.v. is granted to defendant Joyce on Counts III, IV, VI, XII and XIV.

B. *Proof that the mailings were in furtherance of an essential element of a fraudulent scheme*

Defendant Joyce asserts that even if there was sufficient proof of mailing on certain counts, those mailings were not shown to have been in furtherance of an essential element of any fraudulent scheme as is required by *Kann* v. *United States,* 322 U.S. 88, 95 (1944), and *Pereira* v. *United States,* 347 U.S. 1, 8 (1954), and their progeny. Unlike its treatment of the question of proof of mailing, the government's brief fails to make specific reference to the transcript and exhibits on this issue. The Court believes it is entitled to such assistance. Accordingly, the government is granted fifteen (15) days from the date hereof in which to file a further brief setting forth the basis for its general claim as to the sufficiency of the evidence on the issue of how the mailings were in furtherance of an element of the alleged scheme. Defendant Joyce is granted seven (7) days thereafter in which to file an additional reply to the government's brief. This schedule shall be strictly enforced.

II.

Motion for a New Trial Based Upon Newly Discovered Evidence

Defendant Joyce has moved for a new trial based upon his alleged discovery after trial of witness Littlejohn's petition for an arrangement under Chapter XI of the Bankruptcy Act which was filed in the District Court for the Eastern District of Texas in May 1968. Joyce contends that this document shows that Littlejohn testified falsely under oath in the trial of this case.

The initial question is whether to apply the *Larrison* test as set forth in *United States* v. *Becker,* 466 F.2d 886, 889 (7th Cir. 1972) or the *Berry* standard as reaffirmed in *United States* v. *Curran,* 465 F.2d 260, 264 (7th Cir. 1972). Although the *Larrison* test has normally been applied only in the case of recanting witnesses, it has been characterized as pertaining generaliy to evidence of perjury. *United States* v. *Higgins,* 412 F.2d 789, 791 (7th Cir. 1969). Out of an abundance of caution, the Court will apply the *Larrison* standard, which is more favorable to the defendant.

Joyce contends that Littlejohn's petition refutes his sworn testimony on the following points:

(1) he testified that he was in bankruptcy while the petition shows that he is a Chapter XI debtor rather than a bankrupt;

(2) he testified that he broke even on his gambling, but the petition shows a $1,500 gambling loss;

(3) he testified that he did not bring an agreement with him because it was in the hands of the trustee in bankruptcy, whereas the petition does not show that he listed it as a chose in action in the Chapter XI proceedings;

(4) he testified that the outstanding claims, losses, and unearned premiums related to the business he did with Joyce's company amounted to $350,000, whereas the petition shows a much smaller figure.

Even assuming that the petition shows that Littlejohn's testimony was false in the manner alleged and that Joyce was taken by surprise by the false testimony, the Court is entirely unpersuaded, on examining the entire record, that without this testimony the jury might have reached

a different verdict. The first three alleged falsities described above are minor discrepancies on issues collateral to the elements of proof of mail fraud. The fourth discrepancy relates to the extent to which Littlejohn and others may have been injured by dealing with Joyce's company. The gist of the mail fraud charges relating to Littlejohn (Counts VII, IX and XV) was misrepresentation of the company's financial condition, not any damage flowing from it. The jury was carefully instructed as to the elements of the offense of mail fraud and no mention was made of a requirement of actual damage to those whom Joyce allegedly intended to defraud. The Court therefore concludes that even applying the test of *Larrison* v. *United States,* 24 F.2d 82, 87-88 (7th Cir. 1928), defendant Joyce is not entitled to a new trial owing to the discovery of Littlejohn's Chapter XI petition.

III.

Motion for a New Trial on Other Grounds

Defendant Joyce has moved for a new trial on several grounds other than discovery of new evidence. Without any citation of authority, Joyce assigns error to the Court's denial of his motion for severance from defendant Wallace. His stated grounds are that Wallace's testimony implicated him. Joyce fails to specify to which testimony he refers. The mere existence of hostility between defendants or the fact that one may try to save himself at the expense of another is not sufficient to require separate trials. *United States* v. *Hutul,* 416 F.2d 607, 620 (7th Cir. 1969). In any event, the Court notes that the jury rejected Wallace's defense. *Id.* at 621. Joyce has failed to show any prejudice arising from joinder entitling him to a new trial.

Joyce's further grounds asserted for a new trial are merely conclusory and unsupported by citation to the record or authority and will not be considered here.

IV.

Renewed Motion to Dismiss for Lack of a Speedy Trial

Defendant Joyce's original motion to dismiss based upon preindictment delay was denied by Judge Marovitz subject to renewal at this time. In light of the meagre evidence of prejudice to Joyce and the complex nature of the case and the lengthy investigation which preceded it, the Court concludes that the motion must again be denied. The situation here is quite similar to that in *United States* v. *Bornstein,* 447 F.2d 742, 745-46 (7th Cir.), *cert. denied,* 404 U.S. 831 (1971), and the Supreme Court's latest pronouncement in this area, *Barker* v. *Wingo,* 407 U.S. 514 (1972) does not seem to deprive *Bornstein* of any of its vitality.

Accordingly, defendant Joyce's post-trial motions are hereby granted in part and denied in part as set forth above.

It Is So Ordered.

Entered:
/s/ R. W. McLaren
United States District Judge

Dated: March 30, 1973

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 CR 567

UNITED STATES OF AMERICA,

Plaintiff,

v.

THOMAS E. JOYCE,

Defendant

MEMORANDUM OPINION AND ORDER

In its Memorandum Opinion and Order of March 30, 1973, the Court granted defendant Joyce's motion for judgment of acquittal as to Counts III, IV, VI, XII and XIV for insufficient proof of mailing. Sufficient proof was found on this element as to Counts I, VIII, IX, X, XI and XIII.* The government was requested to file a further brief on the sufficiency of the evidence to show that the mailings alleged in the remaining counts were in furtherance of essential elements of a fraudulent scheme and defendant Joyce was allowed to file an additional reply.

Joyce has raised some issues for the first time in his additional reply brief. Although there is a serious question as to their timeliness, the new issues of venue and proof of mailing will be dealt with separately before discussion of the question of whether the mailings were in

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* Count II was dismissed before trial. No challenge was raised as to the proof of mailing under Counts V, VII and XV.

furtherance of the scheme. Joyce's new arguments on whether he caused the mailings will be considered in that later discussion.

Venue

Defendant Joyce asserts that the government failed to prove venue as to Counts I, VII and VIII. Although his failure to object to venue prior to the close of the government's case did not constitute a waiver because the alleged defendants were not apparent on the face of the indictment (*United States* v. *Bohle*, 445 F.2d 54, 58-59 (7th Cir. 1971), he did waive his objection to proof of venue by failing to make it after the government rested and in his motion for acquittal at the close of all the evidence. (1 C. Wright, *Federal Practice & Procedure—Criminal* §306, at 600-601 (1969).

Proof of Mailing

Joyce claims that the government failed to prove that certain count letters were mailed as alleged in the indictment. His arguments as to Counts I, VIII and IX have already been considered and rejected in the opinion of March 30. The sufficiency of proof on this element was not considered at that time as to Counts VII and XV.

Witness Littlejohn, a broker who did business with Global, the insurance company with which the defendants were affiliated, testified that he received the Count VII letter (Ex. 61) by mail (Tr. 1061). Defendant Sherre, who admitted that he authored the letter, could not directly refute Littlejohn's statement, but expressed doubt that the letter had been mailed because it bears the same date as the letter to which it purportedly responded. Sherre testified that Littlejohn might have picked up the letter when he met with Joyce and him in Chicago. (Tr.

1526-28) Littlejohn had previously testified that he had made such a visit to Chicago in the same month as the date on the letter. (Tr. 1063-64)

Defendant Joyce relies upon *Whealton* v. *United States,* 113 F.2d 710, 713-14 (3d Cir. 1940). *Whealton* held that evidence quite similar to that presented here was insufficient to support the inference that the defendant mailed the letter and to exclude all reasonable doubt concerning that fact. See also *United States* v. *Wolfson,* 322 F. Supp. 798, 812 (D.Del. 1971), *aff'd,* 454 F.2d 60 (3d Cir.), *cert. denied,* 406 U.S. 924 (1972). The Court, however, is unaware of any decision of the court of appeals for this circuit which adopts *Whealton* and the trend, if there be one, in this circuit seems to be toward a more liberal standard for the sufficiency of proof of mailing. See *United States* v. *Silvern,* No. 72-1133 (7th Cir., Feb. 27, 1973).

But even if *Whealton* is ignored, and even if Littlejohn's testimony that he received the letter by mail and Sherre's admitted authorship be considered alone, the Court nevertheless must conclude that a reasonable mind could not fairly find beyond a reasonable doubt that defendant Joyce placed or caused the letter to be placed in the mails. The evidence that the letter might have been hand-delivered to Littlejohn in Chicago makes the indirect proof of mailing insufficient because the circumstances proved do not exclude all reasonable doubt as to mailing. See *United States* v. *Fassoulis,* 445 F.2d 13, 17 (2d Cir.), *cert. denied,* 404 U.S. 858 (1971), which was cited with approval in *Silvern, supra.*

Witness Littlejohn testified that he received the Count XV letter (Gov't Ex. 73) through the mail. (Tr. 1073) Defendant Sherre testified that he had "in all probability" mailed the count letter to Littlejohn, that the letter bore

his signature, and that he did not hand-deliver the letter. (Tr. 1523) This is sufficient evidence for a reasonable mind to conclude beyond a reasonable doubt that the letter had been mailed.

Proof that Mailings Were in Furtherance of the Scheme

For a mailing to be in violation of 18 U.S.C. §1341, it must be made "for the purpose of executing such scheme . . . or attempting to do so. . . ." This element is not satisfied if the mailing is only collateral or incidental to the scheme. *Parr* v. *United States,* 363 U.S. 370, 393 (1960). It is sufficient, however, to show that the mailing was incident to an essential part of the scheme *Pereira* v. *United States,* 347 U.S. 1, 8 (1954), or in furtherance of the scheme, e.g., *Henderson* v. *United States,* 425 F.2d 134, 141 (5th Cir. 1970). As to the related question of whether a defendant "caused" such a mailing, it is sufficient

> "when one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended. . . ."

Pereira, supra at 8-9.

With the foregoing principles in mind, we turn to the question of the sufficiency of the evidence under the standard set forth in *United States* v. *Williams,* 311 F.2d 721, 723 (7th Cir.), *cert denied,* 374 U.S. 812 (1963), as to each challenged count.

Count I

The Count I letter (Ex. 114-C) is from an official of a bank, which held an account for Global, advising Joyce that the bank would honor his request for copies of the monthly statements. The government argues that the

jury could have found that the mailing of the count letter was in furtherance of the scheme of Joyce and the other defendants to withdraw and convert funds from the account even though they had represented that it was to be held as a reserve to pay losses. Although the copies of checks drawn on the account (Ex. 116) are almost entirely illegible, the Court has found one such check drawn on the account by Joyce to the American Express Company subsequent to the date of the Count I letter. A reasonable mind could thus have fairly found beyond a reasonable doubt that the count letter was incident to an essential element of the conversion scheme—knowledge of the balance in the account.

Count V

Count V charges the mailing of a letter (Ex. 28-A) from defendant Sherre to Thomas Patterson, a broker for Global, asking for funds from an account into which Patterson had been depositing a portion of the Global premiums. The government asserts that the letter represents an attempt by defendant Sherre to convert the premiums. The fact that defendant Sherre was found not guilty on this count (perhaps due to his defense of good faith), is not dispositive; it is well-settled that there is no requirement of rational consistency in verdicts. The real difficulty with holding defendant Joyce accountable for the Count V letter, even if it is assumed that it was mailed for the purpose of executing a scheme to convert the premiums, is that there is no evidence tending to show that Joyce caused the mailing in the sense that he knew or should have foreseen that Sherre would write such a letter. *Pereira, supra,* at 8-9. Accordingly, the Court concludes that the government's proof as to Joyce on Count V was insufficient to support his conviction.

Count VIII

Count VIII charges the mailing of a letter (Ex. 29) by which Patterson forwarded a copy of a Global statement to a broker in St. Louis. Patterson testified that his was done at the request of defendant Joyce (Tr. 845). Thus the mailing was clearly caused by Joyce and certainly furthered the scheme to make misrepresentations of Global's assets.

Count X

The Count X letter (Ex. 3-F) is a request by Bert Carvahlo, a broker doing business with Global, for information on the status of the trust held by the Cosmopolitan National Bank. Joyce asserts that it is inconceivable that he would have caused Carvahlo to write such a letter, knowing that the bank would merely forward it to Global. In light of the representations which Joyce and the other defendants had made as to the status and purpose of the trust, the Court concludes that Joyce reasonably could have foreseen inquiries such as this.

Count XI

Count XI charges the mailing of the letter from the Cosmopolitan Bank (Ex. 3-F-1) which transmitted the Count X letter to Global. Joyce contends that basing a count on this letter constitutes placing him in double jeopardy for the mailing of the Count X letter and that in any event the Count XI letter is not in furtherance of any scheme. The first contention is so clearly without merit as to require no discussion. The Court concludes that a reasonable mind could fairly find beyond a reasonable doubt that the mailing of the count letter was incident to the essential element of misrepresenting the assets in the trust.

Count XIII

Count XIII charges the mailing of a letter (Ex. 134-C) from Morton Olken to Fred Pearson, a broker who did business with Global. The count letter is a copy of a letter Olken sent to defendant Ostrander forwarding Pearson's letter asking where he should direct payments to Global.

Defendant Joyce argues that because the financial statement of Global which Pearson testified (Tr. 1226-30) he relied on in part in deciding to do business with Global was not executed until *after* the Count XIII letter, the Count XIII letter could not have been in furtherance of any fraud caused by the statement. The jury nevertheless could have reasonably concluded that the count letter was incident to the essential element of obtaining payments to Global, even if the misrepresentations were not made until after this groundwork had been laid.

Count XV

The Count XV letter (Ex. 73) is from defendant Sherre to Littlejohn. It states that Global had received a copy of a letter from one of Littlejohn's brokers to the Cosmopolitan Bank complaining that it had not been paid on a claim, and warns Littlejohn that such letters "may perplex" the bank. The jury could fairly find that the mailing of this letter was incident to the element of prevention of discovery of defendants' misrepresentations of the assets in the trust.

Relief

For the reasons set forth above, defendant Joyce's motion for judgment of acquittal is granted as to Counts V and VII. Although the February 20, 1973 Order of the Court of Appeals remanded this action only for the

purpose of enabling this Court to rule on Joyce's post-trial motions, the Court assumes that there is an implicit grant of jurisdiction within that order to allow any necessary modification of the sentence. Based upon this assumption, and consistent with the foregoing, defendant Joyce's sentence will be modified to the following extent: (1) the concurrent sentences of one year in the custody of the Attorney General on Counts III and IV are vacated; (2) the fines of $1000 each on Counts V, VI, VII, XII and XIV are vacated. The balance of the sentence stands; that is to say, defendant Joyce is sentenced to: (1) one year in the custody of the Attorney General under Count I; (2) pay a fine of $1000 under each of Counts VIII, IX, X, XI and XIII; and (3) suspension of sentence and five years probation under Count XV.

Inasmuch as this Court has jurisdiction only as to defendant Joyce by reason of the Order of the Court of Appeals, no action is taken with respect to the matters dealt with in this opinion, or the one of March 30, insofar as Joyce's co-defendants are concerned.

It Is So Ordered.

Entered:

Dated: June 1, 1973

R. W. McLaren
United States District Judge

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1973 JANUARY SESSION, 1974

Nos. 73-1014, 73-1015, 73-1016

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS E. JOYCE, BURTON SHERRE and HARRY WALLACE,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois,
Eastern Division.
No. 71 CR 567
RICHARD W. MCLAREN, *Judge.*

ARGUED JANUARY 21, 1974 — DECIDED MAY 9, 1974

Before SWYGERT, *Chief Judge*, HASTINGS, *Senior Circuit Judge, and* CUMMINGS, *Circuit Judge.*

CUMMINGS, *Circuit Judge.* A 15-count mail fraud indictment was returned against defendants Joyce, Sherre, Wallace and Robert L. Ostrander. Ostrander pled guilty to count 14, but this count was dismissed as to the other

three defendants. Joyce was convicted under counts 1, 8, 9, 10, 11, 13 and 15; Sherre was convicted under counts 9, 10, 11 and 13, and Wallace was convicted under count 5.[1] The only prison terms imposed were on Joyce, who received a one-year sentence on count 1, and on Wallace, who received a one-year sentence on count 5. Fines and probationary terms were imposed upon Joyce and Sherre under the other counts. This appeal involves the validity of convictions under eight counts (counts 1, 5, 8, 9, 10, 11, 13 and 15) of the 15-count indictment.

Count I, the lead count of the indictment, charged that the four defendants (including Ostrander) devised a scheme to defraud firms engaged in the business of placing insurance risks, denominated in the indictment as "insurance brokers and agents," certain state department of insurance, denominated in the indictment as "state insurance agencies," and persons who were induced to purchase insurance policies from Global Surplus and Excess Limited (Global), a company organized in the Bahamas.

According to the lengthy allegations contained in count 1, defendants caused Trust No. 15385, an Illinois land trust, to be entered into between Global and the Cosmopolitan National Bank of Chicago. Thereafter, defendants represented that the trust was established to protect the United States and Canadian policyholders of Global. They also entered into an agreement giving Sherre a power of attorney to direct the trust. They conveyed certain Illinois real estate into the trust and represented that it was an asset of Global for the benefit of its policyholders. They had the Cosmopolitan National Bank circulate copies of

[1] As explained *infra*, the district court granted post-trial motions of acquittal as to some of the other counts.

the trust agreement to insurance brokers and agents and state insurance agencies to induce them to place and permit the placing of insurance risks with Global. They prepared letters of appraisal for the trust real estate assigning an excess value thereto, and they caused the letters of appraisal to be circulated to insurance brokers and agents and state insurance agencies in order to induce them to use and permit use of Global. They also omitted to advise the insurance brokers and agents and state insurance agencies that some of the trust real estate was heavily mortgaged. They formed an Illinois corporation known as Global Surplus and Excess Limited of Illinois and represented that it was a holding company for the trust real estate. They were charged with making the following false representations in financial statements of Global:

1. The stock of Global Surplus and Excess Limited of Illinois was an asset of Global and had a value of $770,000.

2. Four vacant lots owned by Global in Kenosha County, Wisconsin, had a value of $60,000.

3. 41,250 shares of stock in Howard Savings and Loan Association of Chicago were owned by Global and had a value of $175,000.

4. 1,000 shares of stock in Wor-Wid Construction Company were acquired by Global in 1966 and had a value of $200,000.

5. Fifty shares of stock in Everlast Development Company of Illinois were acquired by Global in 1966 and were worth $150,000.

The grand jury also charged that defendants circulated these false financial statements of Global to insurance brokers and agents and to state insurance agencies. Defen-

dants allegedly converted funds deposited in the checking accounts of various banks that had been deposited for the protection of Global policyholders.

Each of the subsequent counts repeated these general allegations by reference. All fifteen counts alleged a different mailing in violation of 18 U.S.C. § 1341, the mail fraud statute.[2]

Various pre-trial motions of defendants were denied by the district court before the commencement of the jury trial. After a few trial days, the Government moved to dismiss count 2 as to all defendants and count 15 as to defendant Wallace, and the trial judge acceded. The jury found Joyce guilty on all counts (except the dismissed count 2). It found Sherre guilty on counts 7 through 15, and Wallace guilty on counts 5, 6 and 8. The district

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[2] Section 1341 of the Criminal Code provided as follows at the times of the mailings charged in the indictment:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

court granted Joyce's post-trial motions for acquittal as to counts 3 through 7 and 12 and 14. The court also granted Sherre's motion for acquittal on counts 7, 8, 12 and 14, and Wallace's motion for acquittal on counts 6 and 8. As noted above, Joyce is appealing his conviction on counts 1, 8, 9, 10, 11, 13 and 15; Sherre is appealing on counts 9, 10, 11, 13 and 15; and Wallace on count 5.

Defendants rather half-heartedly contend that the scheme was not proven because there is no showing that the misstatements of assets were made with intent to defraud rather than negligently. The magnitude of the misrepresentations is alone sufficient to support the jury's finding that they were not made negligently. Additional evidence of *scienter* is summarized *infra* at pp. 16-17 in the discussion of Sherre's separate contention that he was simply Global's attorney and was never aware of the fraud being perpetrated by his clients.

Defendants next contend that the evidence failed to sustain the charges concerning the individual mailings. In the interests of an orderly presentation, we will take up the counts assailed in numerical sequence.

Count 1

Joyce is the only defendant convicted under this count, which charged that Joyce and his co-defendants caused a letter to be mailed to Joyce from the Industrial Valley Bank & Trust Company.[3] The letter was addressed to

[3] The indictment refers to this bank as being "of Philadelphia, Pennsylvania"; the bank officer testified that the letter was mailed from the suburban Marion, Pennsylvania, branch. Defendants do not assail this discrepancy.

Joyce by W. Kenneth Clark of that bank and agreed to send Joyce duplicate statements of Global's account with the bank commencing with the May 1966 statement. The Government has argued that the letter furthered the scheme because it was essential for Joyce to keep track of the balance in the account so that he and other defendants could withdraw funds from the account for their own use, although they represented that it was to be a reserve to pay losses. Since the district court found that Joyce had drawn a $2,359.65 check on the account payable to American Express, it concluded that " a reasonable mind could thus have fairly found beyond a reasonable doubt that the count letter was incident to an essential element of the conversion scheme—knowledge of the balance in the account."[4] We agree that the trier of fact could have drawn the inference that the American Express check was not drawn to pay a policyholder's claim. Whether the check paid for business or personal expenses is of no moment—either use is inconsistent with maintenance of the account as a loss reserve for policyholders.[5]

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[4] The check payable to American Express is the only one of a series of checks drawn on the account (Govt. Ex. 116) on which both the payee and the date are legible. The district judge relied on this check because it was dated later than the count letter. We note that there are also six checks with illegible dates (but lower check numbers than the check to American Express) payable to defendants: two to Thomas Joyce, two to Burton Sherre, and two to Robert Ostrander.

[5] Consequently, it is unnecessary to accept the Government's additional argument that Joyce required these bank statements in order to misrepresent the balances on deposit in that bank.

Conceding this *arguendo*, Joyce argues that he only requested a bank statement, and that the mailing charged was not a bank statement, but an unexpected acknowledgment of his request—a mere courtesy letter. He argues that he did not cause the mailing of the courtesy letter, and that the courtesy letter could not have furthered the scheme. However, the letter was more than a mere acknowledgment; it also informed Joyce that there would be a $1 per month fee for the service he requested. It was foreseeable that there would be a charge, and that the bank would not impose the charge without an explanation. Joyce could thus foresee that his request would cause the mailing of a letter advising him of the fee, and this is sufficient. "[O]ne 'causes' the mails to be used where he 'does an act with knowledge that the use of mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended * * *.'" *United States* v. *Maze*, ... U.S. ....., 42 L.W. 4113, 4114, quoting from *Pereira* v. *United States*, 347 U.S. 1, 9. The count letter also furthered the scheme since it was impossible for Joyce to obtain the needed bank statements without causing the mailing of the count letter.

As to the proof of mailing of this count letter, witness Clark testified that he dictated the letter and that his secretary's practice was to send out all dictated letters (other than interoffice correspondence) by mail. Testimony as to office practice is sufficient proof of mailing. *United States* v. *Shaven*, 287 F.2d 647, 652 (7th Cir. 1961); *United States* v. *Silvern*, ... F.2d ....., No. 72-1133, slip op. at 9-10, reheard *en banc* on other grounds, 484 F.2d 879 (7th Cir. 1973); *United States* v. *Flaxman*, ... F.2d ....., No. 73-1616, slip op. at 6-7 (7th Cir. 1974). While the evidence

in those cases was somewhat stronger than here, we hold that Clark's testimony was sufficient proof of mailing. Even weaker proof of mailing was held sufficient on some counts in *King* v. *United States*, 25 F.2d 242, 244 (6th Cir. 1928).

Joyce also contends that venue has not been established despite the showing that the usual procedure was to mail such a letter from Pennsylvania to the recipient at the address shown on the letter, here 7019 West Higgins Avenue, Chicago, Illinois 60656. In the normal course of the mails, we presume that a letter is sent to the address shown, so that venue was adequately established. Cf. *Grannis* v. *Ordean*, 234 U.S. 385, 397-398; *Henderson* v. *Carbondale Coal & Coke Co.*, 140 U.S. 25, 37; *Marston* v. *Bigelow*, 22 N.E. 71, 73, 150 Mass. 45 (1889). In any case, the district court properly held that Joyce waived his objection to proof of venue by failing to make it after the Government rested or in his motion for acquittal at the close of all the evidence. 1 Wright Federal Practice and Procedure, Criminal § 306 at 600-601 (1969).

Count 5

Wallace is the only defendant presently convicted under count 5. That count charged defendants with the December 21, 1966, mailing of a letter to International Excess Agency, Inc. in Cleveland, Ohio. The letter was from Burton Sherre to Mr. Paterson of the International Excess Agency. It stated that Wallace, Joyce and Ostrander had agreed that some of the cost of Sherre's legal services should come from Global funds held by Paterson's office. This request was refused by Paterson because the Ohio Department of Insurance had asked him to keep all Global funds in escrow. With Wallace's and Joyce's consent, Sherre was attempting to obtain for himself funds

that were segregated for the benefit of policyholders' claims in Ohio. The letter thus falls within the conversion scheme alleged.

At the time this letter was sent, Wallace was still active in Global's affairs. As a member of a mail fraud scheme, Wallace was responsible for any letter which any other member of the scheme caused to be mailed in execution of the scheme. *Pritchard* v. *United States,* 386 F.2d 760, 764 (8th Cir. 1967), certiorari denied *sub nom. Borchelt* v. *United States,* 390 U.S. 1004; *Babson* v. *United States,* 330 F.2d 662, 665 (9th Cir. 1964), certiorari denied, 377 U.S. 993; *Sherwood* v. *United States,* 300 F.2d 603, 605 (5th Cir. 1962), certiorari denied, 371 U.S. 838; *Blue* v. *United States,* 138 F.2d 351, 358 (6th Cir. 1943), certiorari denied, 322 U.S. 736; *Tincher* v. *United States,* 11 F.2d 18, 21 (4th Cir. 1926), certiorari denied, 271 U.S. 664; *Silkworth* v. *United States,* 10 F.2d 711, 717 (2d Cir. 1926), certiorari denied, 271 U.S. 664; cf. *Kann* v. *United States,* 323 U.S. 88, 93. In its memorandum opinion of August 10, 1973, the district court stated that it had erroneously granted Joyce's motion for acquittal on count 5 since the Government had not drawn its attention to the language in the count 5 letter stating that Joyce had also agreed to Sherre's request. But under the rule just stated, each schemer was responsible for Sherre's acts in furtherance of the common scheme, whether or not he knew of or agreed to the specific mailing. We have been directed to no 7th Circuit cases applying this rule in the absence of a separate count charging conspiracy; somewhat surprisingly, the issue appears not to have arisen in this Court. But we have upheld the admissibility of hearsay declarations by persons shown to be coconspirators in cases where conspiracy was not charged. *United*

States v. *Jones*, 438 F.2d 461, 466 (7th Cir. 1971); *United States* v. *Blue*, 432 F.2d 1191, 1194 (7th Cir. 1970), certiorari denied, 401 U.S. 921; *United States* v. *Bernard*, 287 F.2d 715, 719-721 (7th Cir. 1961), certiorari denied, 366 U.S. 961. We therefore have no hesitation in joining at least six other circuits in applying conspiracy principles to a multi-member mail fraud scheme. The nature of the group activity is the same whether or not a conspiracy is charged.

Count 8

Joyce is the only defendant whose conviction was left standing under count 8. This count charged that Joyce and the other defendants caused International Excess Agency of Cleveland, Ohio, to mail Joyce a copy of its letter of February 16, 1967, to Carl Brown in St. Louis, Missouri, enclosing a copy of Joyce's false statement of assets, so that Brown could secure approval for Global to do business in Missouri. This of course furthered the scheme. Perhaps recognizing that the sending of a copy of this letter to Joyce helped him keep track of who had been told what in the scheme of misrepresentations, his brief merely states that it is "inconceivable that a carbon copy of a letter to an alleged schemer could in any way have furthered the scheme charged." We find it quite conceivable.

Joyce is somewhat more persuasive in his contention that proof of mailing of this count letter was lacking. The Government concedes that the proof of mailing as to count 8 is "possibly the most circumstantial." The trial court granted Sherre's and Wallace's post-trial motions for acquittal on count 8, stating "the government merely proved the mailing of a letter from Cleveland to St. Louis, Missouri, which bore the notation 'cc: Mr. Thomas Joyce.'

This is not a sufficient basis for a reasonable inference that a copy was mailed to Joyce." We disagree, for the witness Paterson testified that the notation meant a carbon copy was directed to Joyce, and that the customary procedure was to place such a copy in a separate pile of mail going to Joyce or Global, and then to mail the pile in one envelope. That was sufficient. *United States* v. *Shaven, supra.* Since the copy was sent to Joyce in Chicago, venue was present.

Count 9

This count involves both Joyce and Sherre. It charges that the defendants caused the Cosmopolitan National Bank of Chicago to send a letter to E. P. Littlejohn & Company in Marshall, Texas, telling the addressee that the beneficiary of Trust No. 15385 was Global and that the party to contact under the trust was Burton Sherre at 7019 West Higgins Avenue, Chicago. Neither defendant contends that the letter was not in furtherance of the scheme. They do contend that there is no proof of mailing of this count letter. Corrinne Bek, assistant vice president of the bank and sender of the letter, testified that the signed letter was placed in an enveolpe and put in the "outbox going out for the mail" and that the bank's mail boys would "pick it up, * * * run it through the postage meter and then * * * bag the mail and take it to the Oak Street Post Office." Under *United States* v. *Shaven, supra,* this was sufficient proof of mailing. Defendants argue that there is no evidence Miss Bek testified of her own knowledge, but she purported to do so, and in the absence of some indication that she only knew what the mail boys told her, we assume she knew the procedures in her own office. We doubt that defendants seriously disagree, since Miss Bek was not cross-examined as to the source of her

knowledge. Mailing can be proved by office custom without producing as a witness the person who personally placed the letter in a United States mailbox. *United States* v. *Flaxman, supra.*

Counts 10 and 11

Both Joyce and Sherre were convicted under counts 10 and 11. These counts concern a written inquiry and a letter forwarding the inquiry and therefore will be considered together. The count 10 letter is from B. Carvalho of the Bala-Cynwyd, Pennsylvania, company bearing his name, and is addressed to the Cosmopolitan National Bank. The letter states that Carvalho & Company, Inc. is a correspondent of Global and "its largest producer of premiums" and that it would like to know the status of Trust 15385. The count 11 letter is Miss Bek's letter of Global, attention of defendant Sherre, stating that the inquiry should receive his immediate attention. Since defendants were inducing insurance brokers to rely on this trust as a protection for policyholders, the count 10 letter was certainly foreseeable. The letter was written at a time when Carvalho was attempting to have defendant pay for losses claimed by policyholders, so that he was of course interested in the assets of the trust. Part of the trust agreement with the Cosmopolitan Bank was to forward correspondence concerning the trust to defendant Sherre. This enabled defendants to continue their misrepresentations about the trust instead of permitting the bank to divulge its true value. The jury was entitled to consider these letters as furthering the scheme.

As to proof of mailing, Carvalho testified that he or his secretary would take outgoing mail to the post office at the end of each day and that this procedure was followed with respect to the count 10 letter. He further testified that the letter, which was found in the files of

the Cosmopolitan National Bank, was not hand-carried from Pennsylvania to Chicago. The proof of mailing was accordingly sufficient.

With respect to the count 11 letter, the proof of its mailing was supported by Miss Bek's testimony about office procedure described under count 9, and her testimony that she put the count 11 letter into the normal course of that procedure.

Defendants' argument that counts 10 and 11 deal with the same letter so that they cannot be separately and cumulatively punished for each count is too frivolous to require treatment under a separate heading. The substantive offense is use of the mails, and "there is no doubt that the law may make each putting of a letter into the post office a separate offence." *Badders* v. *United States*, 240 U.S. 391, 394.

Count 13

Joyce and Sherre were convicted under this count which involved a letter from Morton Olken to defendant Ostrander. The count letter is a copy of this letter allegedly sent by Olken to Fred Pearson at 223 West Jackson Boulevard in Chicago. The letterhead was that of Atlantic Insurance Agency, Inc., Chicago, Illinois. Although Pearson testified that the letter had been opened by his mail department and stamped accordingly, he also stated that the mail department opened and stamped privately delivered letters as well as letters received through the mail. He concluded that it was possible that Olken dropped the letter off at his office. Particularly since both men's offices were in Chicago, we cannot accept the district court's view that Pearson's doubt was no greater than the possibility of error "inherent in any situation where

the government seeks to prove mailing by evidence of customary procedures." Since the only witness had a reasonable doubt whether the letter was mailed, the jury had to speculate to reach its verdict. We hold that the Government did not sufficiently show that the mails had been used with respect to this communication. We need not consider defendants' additional contention that this letter did not further the scheme.

Count 15

Joyce and Sherre were also convicted under this count, which charges defendants with causing a February 29, 1968, letter to be sent by Sherre to E. P. Littlejohn & Son in Marshall, Texas. In the count letter, Sherre stated that Global had received from Cosmopolitan a copy of an unpaid claimant's letter sent to Cosmopolitan. The original of that letter had been sent to Littlejohn, stating, according to the count letter, that the complaining insurance broker was "quite concerned over not being paid on a claim." Sherre admonished Littlejohn that "unfortunately this type of letter [from the claimant] may perplex our bank." The letter could be deemed in furtherance of the scheme because defendants would not wish the Cosmopolitan to correspond with brokers and divulge the true value of the trust. Defendant Sherre testified that he did not hand this letter to Littlejohn but "in all probability mailed it to him." This was sufficient proof of mailing.

Applicability of United States v. *Maze.*

At the oral argument, the parties discussed the impact of *United States* v. *Maze,* ..... U.S. ....., 42 L.W. 4113, on this case. There the Supreme Court held that the mail fraud statute was not violated where respondent had used

a stolen credit card at motels that thereafter mailed the underlying sale invoices to an out-of-state bank. The Court held that the mailings were not "for the purpose of executing such scheme" (18 U.S.C. § 1341) because respondent's scheme had reached fruition when he checked out of the motels and "the mailings from the motel owners here to the Louisville bank increased the probability that the respondent would be detected and apprehended" (42 L.W. at 4115). In contrast to *Maze*, the scheme here was to earn profits by persuading people to place insurance with the under-capitalized company. Therefore, any letter which was incident to the running of Global and which tended to give the impression that all was well, that risks were adequately protected, and that business was being transacted normally, was in furtherance of the scheme under prior Supreme Court cases approved in *Maze*. While inquiries to Cosmopolitan were aimed at detecting any fraud which might exist, it was necessary to permit such inquiries to persuade some victims that the trust was as represented. Defendants were found to have arranged favorable replies to such inquiries, so that these mailings were also in furtherance of the scheme. *Maze* does not affect the foregoing analysis of the mailings involved in this appeal.

Pre-Indictment Delays

Defendants claim that their rights under the Sixth Amendment and Rule 48(b) of the Rules of Criminal Procedure were violated by the 34-month delay between the first presentation of the case to the grand jury and the return of the indictment. However, *United States* v. *Marion*, 404 U.S. 307, establishes that the Sixth Amend-

ment speedy trial provision has no application until defendants are accused, either by indictment, information, or arrest. *Marion* also decided that Rule 48(b) is limited to post-arrest situations. *Id.* at 319. Defendants claim that they were accused when the case was first presented to the grand jury. But *Marion* clearly did not consider such "targeting" an accusation which triggers the right to a speedy trial. In *Marion,* newspapers stories in October 1967 quoted the United States Attorney as saying the matter was under investigation and indictments would be forthcoming. In summer 1968, Marion delivered his company's records to the United States Attorney and was interviewed about the case. *Id.* at 309. The Court held that there was no accusation until Marion was indicted on April 21, 1970. *Id.* at 313.

The *Marion* opinion did say that the due process clause requires dismissal of an indictment if pre-indictment delays caused substantial prejudice to defendants' right to a fair trial and were an intentional device to gain tactical advantage over them. *Id.* at 324. Here the pre-indictment delays did not extend beyond the period of the applicable statute of limitations, and *Marion* clearly implies that the limitations period is the only protection against delay unless specific prejudice is shown. Two district judges, one before trial and one after, independently examined defendants' claims of prejudice and found them insubstantial. We agree. The only specific complaint is that two witnesses died. The first, a Mr. Black, would allegedly testify that he filed Global's financial statement with the Pennsylvania Insurance Department, even though Joyce told him not to file it because it was erroneous. Since Global did business in Pennsylvania, defendants had to know that papers had been filed with the Pennsylvania

Insurance Department, and they could have shown any attempts to correct Black's misstatements by cross-examining the witness from the Department. Defendants' only argument as to the second witness, John Carvalho, is that witness Paterson testified to many conversations to which Carvalho was a party. While it might have been helpful to defendants to question Carvalho, their due process rights were protected by cross-examination of Paterson. It is also significant that defendants' brief indicates that Carvalho died "around 1968," so that even if the Government had proceeded much more quickly than it did, Carvalho would probably have died before trial.

Nor is there any showing of intentional delay by the Government. The voluminous transcript and exhibits show that this scheme was a complex one that must have required a lengthy investigation. Judge Marovitz found that the first grand jury to hear the case did not indict, but designated a postal inspector to investigate further. Defendants' due process claims based on *Marion* cannot be sustained.

Post-Indictment Delays

Defendants also complain of the 12-month delay between their indictment and trial. The leading case in this area is *Barker* v. *Wingo,* 407 U.S. 514, where the Court held that the constitutional right to a speedy trial must be determined by weighing the conduct of the prosecution and that of the defendant in the light of four factors: "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 530. A 12-month delay, while not insignificant, is not extreme. In *Barker,* the delay was well over five years, but other factors led the Court to find no denial

of a speedy trial. In *United States* v. *DeTienne*, 468 F.2d 151 (7th Cir. 1972), we found a 19-month delay justified.

The reasons for the delay are attributable in varying part to the defendants, the Government, the district court's docket, and the complexity of the case. Of course, more delay is tolerable in a complex case. 407 U.S. at 531. Defendants' first round of pre-trial motions, originally due July 1, 1971, were not all filed and briefed until August 23. The Government was given ten days to respond, and took thirty; defendants' reply was due five days thereafter, but was not filed for twenty days. At each step the district judge granted extensions or accepted late filings, and this appears reasonable in light of the number and complexity of the motions. The motions were finally ruled on on November 19 and the case was set for trial on January 31, 1972. At this point the Government requested a continuance, explaining that the attorneys responsible for the case were involved in lengthy trials before other judges of the district court which would persist until just before January 31. According to the docket sheet, this was its only such request. The trial was reset for March 6, and the Government's attorneys agreed to meet at night during their other trials to negotiate stipulations on technical aspects of the case. Shortly thereafter the case was reassigned to a newly appointed judge who could not try it on the day set. *Barker* indicates that delay due to reasons such as overcrowded courts should be considered against the Government, but should not be weighed very heavily. 407 U.S. at 531. The case did proceed to trial as soon as the new judge had a date available; defendants continued to file additional pre-trial motions until the eve of the June 15th trial.

Although defendants did make a timely assertion of their right to a speedy trial, they have not satisfactorily shown actual prejudice. There is no allegation of specific prejudice from post-indictment deaths and the likelihood that memories faded over the total four-year period. Because prejudice was so slight, because only part of the delay is attributable to the Government, and because there is no indication that the Government-caused delay was deliberate or due to culpable negligence, we do not consider this a close case. The right to speedy trial was not violated.

Denial of Severance

Defendants insist that the district court should have granted their motion for severance because Wallace took the stand and blamed the scheme on Joyce. This is an insufficient reason to require a separate trial. *United States* v. *Hutul,* 416 F.2d 607, 620 (7th Cir. 1969), certiorari denied *sub nom. Sacks* v. *United States,* 396 U.S. 1007; *United States* v. *George,* 477 F.2d 508, 515 (7th Cir. 1973). Furthermore, Joyce's attorney did not bother to cross-examine Wallace to show that the jury should disbelieve his testimony. It is said that this was because Joyce himself was absent, but after Wallace's direct testimony and before his cross-examination, Joyce executed a written waiver of his right to be present, even though his hospitalization would almost certainly have justified a continuance or severance if requested. In any event, if Joyce had been severed and Wallace's trial completed, Wallace's testimony would have been available to the Government at Joyce's second trial.

Finally, it is no justification for severance that Joyce and Sherre wanted a bench trial, while Wallace insisted on a jury trial. There is no right to a bench trial (*Singer*

v. *United States*, 380 U.S. 24), and avoidance of duplicate two-week trials is certainly a legitimate reason for withholding consent to the proffered jury waiver. We conclude that Joyce has not shown sufficient prejudice to justify reversal.

Sufficiency of Evidence as to Sherre

Sherre attempts to void his conviction by claiming a lack of knowledge during his association with Global. The evidence refutes this claim. Sherre was centrally involved in the scheme, since he handled most of the correspondence from Global's Chicago office. It would be extraordinary if he never learned what was going on. This does not mean he can be convicted by association, but it does increase the significance of any evidence tending to show his actual knowledge of the scheme's nature.

According to the credited testimony, Sherre was first involved in this scheme in May 1965. On May 26, he was at a meeting with Joyce, Ostrander and Wallace and a Mrs. Chambers. Joyce told the others that he would place certain property, which he described to the group as worth more than $750,000, into the trust fund at Cosmopolitan. In Sherre's presence, he then dictated a letter describing the trust property as worth $1,180,000. In the presence of Sherre and the others, Mrs. Chambers typed the letter and signed the name Raymond Kusniar to it.

A Mrs. Lewis testified that in November 1965, she met with Sherre, Joyce and Ostrander. She warned all three that they were under government scrutiny and that there was particular concern about the land trust. She also complained about not being paid, and in Sherre's presence, Joyce told her that Global was insolvent. She responded that there had been "several occasions" when it had enough money to pay her.

Sherre had the power of direction over the trust at Cosmopolitan. As an attorney, he must have known that Cosmopolitan, as trustee of an Illinois land trust, was completely subject to his directions on behalf of Global, and had no independent power to protect the policyholders. Sherre wrote the count 15 letter urging brokers not to correspond directly with Cosmopolitan, which indicates he was aware that Cosmopolitan would not support Global's representations.

The evidence concerning Sherre's involvement justified the jury's conclusion that he participated in the common plan to defraud with the requisite criminal intent.

Evidentiary Rulings

Defendants protest that appraisal evidence should not have been received because the Government inadvertently failed to disclose the appraisals to defense counsel. Rule 16(g) of the Federal Rules of Criminal Procedure offers a district judge four sanctions for a violation of the Government's duty to disclose. Here the judge chose one of the alternatives, namely, a continuance as to the appraisal witness, to give defendants time to prepare for cross-examination. Defendants declined the continuance. Therefore, there was no error in receiving the appraisal testimony.

Asserting a hearsay objection, defendants complain that witness Minner, the chief of the Surplus Lines Division for the Pennsylvania Insurance Department, was permitted to read from Government Exhibit 145, in which the Royal Bank of Canada advised the Pennsylvania Insurance Department that Global no longer had any account with that bank. Since none of defense counsel objected

to the receipt of Exhibit 145 in evidence, it was accordingly received. Once the exhibit was in evidence and could go to the jury, it can not have been error to allow Minner to read from it. Furthermore, the hearsay objection was not made below. Defendants' only complaint was that the reading of the exhibit on redirect was outside the scope of cross-examination.

Defendants also assail the testimony of Mrs. Lewis discussed *supra* at p. 16. Such testimony bore on *scienter* and therefore was properly admitted.

Finally, it is complained that witness Paterson was permitted to testify that in addition to $2500, his company "lost a great deal else in the way of reputation." Since the mail fraud statute covers "any scheme or artifice to defraud, *or* for obtaining money or property" (note 2, *supra;* emphasis added), the Government did not have to confine its proof to monetary loss. Cf. *United States* v. *Rowe,* 56 F.2d 747, 749 (2d Cir. 1932).

Instructions to Jury

First of all, defendants complain of Government Instruction No. G-31 which defined "scheme to defraud" and was substantially the same as LaBuy Jury Instruction 16.02, 36 FRD 601. The last sentence reads "It is essential only that one or more of them [pretences, representations and acts charged in the indictment] be proved to show the existence of the scheme." Defendants suggest that this is erroneous because it would permit the jury to convict where only part of a scheme was proved. On the contrary, it is well established that every allegation of an indictment charging a scheme need not be proved in order to convict. *Schaefer* v. *United States,* 265 F.2d 750, 753 (8th Cir. 1959), certiorari denied, 361 U.S. 844; *Myrick* v. *United States,* 332 F.2d 279, 281 (5th Cir. 1963),

certiorari denied *sub nom. Bergman* v. *United States,* 377 U.S. 952. We would prefer that the instruction be modified in the future to track more closely the cases cited, so as to avoid any possible implication that the jury must find a scheme if it finds that any one allegation of the indictment is proved. The *Schaefer* version of this instruction avoids that ambiguity by providing that the government must "prove one or more of a sufficient number of the representations to indicate and show that the scheme alleged was actually set up * * *." 265 F.2d at 753. While such a variation of the LaBuy instruction would be more appropriate, the chance that the instruction given was misunderstood is not great enough to rise to the level of reversible error. Moreover, no objection was made to the instruction, as required by Rule 30 of the Federal Rules of Criminal Procedure, so that any error in this regard was waived. *United States* v. *Zweig,* 467 F.2d 1217, 1222 (7th Cir. 1972), certiorari denied, 409 U.S. 1111.

Defendants also object to the court's use of the following sentence from LaBuy Instruction 4.05 (33 FRD 553):

> "No person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate."

We adhere to *United States* v. *Grizaffi,* 471 F.2d 69, 75 (7th Cir. 1972), certiorari denied, 411 U.S. 964, upholding the propriety of this instruction. See also *United States* v. *Squires,* 440 F.2d 859, 864 (2d Cir. 1971).

Defendants assail one sentence from the court's charge with respect to reasonable doubt[6] but ignore other in-

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[6] The sentence in question provides:

> "Indeed the law requires a conviction where there is sufficient legal evidence to show the defendant is guilty beyond a reasonable doubt."

structions concerning reasonable doubt that were also given.[7] Defendants assert too that the portion of the reasonable doubt charge quoted in note 6 is contradicted by a later portion of the charge concerning evidence of good character.[8] In our judgment, these instructions taken together were not so confusing or contradictory as to prejudice the defendants. We think the jury properly understood these later instructions to modify, rather than contradict, the instruction in note 6. But that instruction would be better worded if it avoided the troublesome phrase "sufficient legal evidence" and simply told the jury that it must convict if persuaded of guilt beyond a reasonable doubt.

The majority concurs in Part III of Chief Judge Swygert's dissent. The views there expressed apply with

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[7] For example, defendant's Instruction No. 15 provided:

"You cannot find any defendant guilty unless you believe beyond a reasonable doubt that he acted with the requisite intent. Evidence of a defendant's relationship with Global Surplus and Excess Ltd. and his stake or lack of one in the financial success of that enterprise may be considered on the issue of intent. If you believe that a defendant lacked the requisite intent, then, as I indicated, it is your duty to find him not guilty."

A similar instruction was given on good character (note 8, *infra*), and on good faith.

[8] The supposedly contradictory sentence provides:

"The circumstances may be such in a particular case that evidence of good character may alone create a reasonable doubt of defendant's guilt, although without it the other evidence would be convincing."

equal force to counts 5 and 8. The difference between us is only that we do not believe the jury's verdict on those counts is unsupportable as a matter of law.

For the foregoing reasons, the judgments are affirmed except that Joyce's and Sherre's convictions under count 13 are reversed.

SWYGERT, *Chief Judge,* dissenting in part.

I respectfully dissent in part. I cannot agree with the majority that there was sufficient evidence to support a conviction of Wallace on Count 5 and Joyce on Count 8, and accordingly I would reverse the convictions on these counts.

I

Count 5, briefly restated, charged all four defendants with the mailing of a letter to Tom Paterson of International Excess Agency, Inc., Cleveland, Ohio from codefendant Burton Sherre. In his letter, Sherre represented that codefendants Wallace, Joyce, and Ostrander agreed that "some of the cost" of Sherre's legal fees for settling claims should come from Global funds held by International. The sum of $1,000 was specified. Sherre was found not guilty on this count by the jury, and the trial judge granted Joyce's post-trial motion for judgment of acquittal. Thus Wallace is the only defendant who now stands convicted under Count 5.

The majority has affirmed Wallace's conviction upon a finding of the following: Wallace was active in the affairs of Global at the time the letter was sent; the count letter falls within the conversion scheme; and Wallace was responsible for any letter which any other member of the scheme caused to be mailed in execution of the scheme.

I am unpersuaded that the count letter falls within the conversion scheme. The scheme as outlined in the indictment alleges that Global Surplus and Excess had represented that defendant held out inflated and non-existent assets to insurance brokers and state insurance agencies. The scheme was not use of the mails to defraud by settling claims and seeking payment from retained premiums to pay legal counsel. The letter upon which the conviction under Count 5 is based is solely an effort by Sherre to secure compensation for legal services rendered in effecting settlement of claims.

Assuming, *arguendo*, that the count letter can be said to fall within the conversion scheme, I cannot agree that the Government proved Wallace was in any way responsible for the letter. That letter, written by Sherre, merely indicates that Wallace along with the other codefendants, agreed to Sherre's request made to Paterson. Conspicuous by its absence from the record, however, is any evidence of the following: that Wallace and the other codefendants had in fact agreed on how Sherre should be compensated for his services; that Wallace knew of the letter or of its mailing; that Wallace asked Sherre to send the letter; or that Wallace in any way ratified Sherre's letter. Reliance upon the language in the letter wthout more is insufficient to support a finding of authorization or ratification by Wallace for the mailing of the letter.

I also harbor doubt as to how active Wallace was in the affairs of Global at the time the letter was sent since the record is replete with evidence that Wallace at the time was estranged from his codefendants.

II

I am additionally disposed to disagree with the majority in their affirmance of Joyce's conviction on Count 8. That count charged defendants with causing International to

send Joyce a copy of its letter to Carl Brown of Royal Excess Underwriters, St. Louis. The count letter informed its recipient that a financial statement of Global was enclosed with the consent of Joyce. Joyce is the only defendant who now stands convicted under this count. His co-defendants were acquitted on the count on the basis of their post-trial motions.

Setting aside the question of whether the letter can be construed as a part of the scheme alleged in the indictment, I find the record will not support a conclusion that there was sufficient evidence to establish proof of mailing a copy of the letter to Joyce or his receipt of it. The concession by the Government, "that the proof of mailing as to Count 8 is probably the most circumstantial" is close to demonstrating the vulnerability of the proof of mailing.

The Government unsuccessfully attempted to establish proof of mailing through the testimony of Tom Paterson who directed a subordinate to draft the letter and enclose a financial statement of Global. While Paterson testified to the customary procedures for mailing letters and copies in his office, it is significant that he did not personally prepare the letter and that he did not know whether he was in his office on the date shown on the letter. In this posture, Paterson could not say that a copy of the letter was ever mailed or received by Joyce in Chicago. No other testimony was offered by the Government to establish proof of mailing. The notation in the count letter "cc: Mr. Thomas Joyce" standing by itself is an insufficient basis from which to conclude that a copy was mailed to Joyce. Accordingly, the conclusion is inevitable that even when the evidence is viewed in a light most favorable to the Government, the record will not support a reasonable inference that a copy of the letter was sent to Joyce.

After the notice of appeal had been filed in this court, we remanded to the district court for the limited purpose of disposing of certain post-trial motions filed by Joyce. On remand a motion for judgment of acquittal on Counts 3 through 7 and 12 and 14 (on which Joyce had been found guilty) was granted. The district court denied the motion as to Count 8.

Later, Joyce's codefendant secured a similar remand to the district court. The motion for acquittal on Count 8 was granted to Joyce's codefendants Sherre and Wallace. In ordering acquittal, the district judge stated:

> Count 8 alleges that defendants caused a letter to be mailed from Cleveland, Ohio, to defendant Joyce in this district. No such letter was ever offered in evidence. Instead, the government merely proved the mailing of a letter from Cleveland to St. Louis, Missouri, which bore the notation "cc: Mr. Thomas Joyce." This is not a sufficient basis for a reasonable inference that a copy was mailed to Joyce. Without such an inference, a reasonable mind could not fairly conclude that the evidence showed the essential element of mailing beyond a reasonable doubt.

Afterward, Joyce asked for equal treatment. His request was denied, the judge reasoning that the district court had lost jurisdiction over Joyce because the limited remand as to him had terminated when his post-motions had been acted upon. This recitation of facts clearly demonstrates the unfairness to this defendant through an affirmance of Count 8.

Moreover, since the record is barren of any evidence to establish that Joyce ever received a copy of the letter in Chicago, it must be concluded that proper venue has not been established.

III

Although I do not dissent from the affirmance of the convictions under Counts 1, 10, and 11, I am troubled by them.

In my opinion, the Government has stretched to the breaking point the mail fraud statute by using as the count letter in Count 1 the acknowledgment from W. Kenneth Clark of the Industrial Valley Bank and Trust Company, Philadelphia, of Joyce's request for a monthly bank statement of the Global account. The acknowledgment letter was only tangentially related to the fraudulent scheme. I believe the intent of the statute would be better served by using mailings that have something more than a strained relation to the scheme, and not a miscellaneous, random piece of correspondence that requires tortuous reasoning on the Government's part to sustain the conviction.

The foregoing observation is equally applicable to Counts 10 and 11 where the count letter in Count 10 becomes the underlying basis for Count 11 since the latter count dealt with merely a forwarding of a photostatic copy of the Count 10 letter from the original addressee, Cosmopolitan National Bank, to Global. If the copy of the original letter had been forwarded several times through the mail, presumably the Government would have been able to indict for each separate mailing. It seems to me the prosecutor has a responsibility to exercise restraint and should not approve indictments on essentially irrelevant or duplicative mailings in order to increase the number of counts.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
May 28, 1974.

Before
Hon. Luther M. Swygert, Chief Judge
Hon. John S. Hastings, Senior Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 73-1014, 1016 vs.

THOMAS E. JOYCE and BURTON SHERRE,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 CR 567
Richard W. McClaren, Judge.

ORDER

On petition for rehearing, defendant Joyce has called the Court's attention to his motion for acquittal at the close of all the evidence which specified only the general ground that the Government had failed to prove its case. On consideration whereof, the slip opinion issued May 9, 1974, is amended by deleting the last sentence and reference from the second paragraph of page 6.

The petitions for rehearing filed by defendants Joyce and Sherre are denied.

Chief Judge Swygert voted to grant the petition for rehearing in No. 73-1014.

APPENDIX E

— Opinion by Judge Cummings —
(Judge Swygert, dissenting in part)
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
May 9, 1974

Before
Hon. Luther M. Swygert, Chief Judge
Hon. John S. Hastings, Senior Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Nos. 73-1014, 1015 and 1016 vs.

THOMAS E. JOYCE, BURTON SHERRE and HARRY WALLACE,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, Affirmed, except that Joyce's and Sherre's convictions under count 13 be and the same are hereby Reversed, in accordance with the opinion of this Court filed this day.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

HARRY WALLACE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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